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THE MEANING OF THE WORD "ATTEST," IN THE ILLINOIS STATUTES, RELATING TO WILLS.

The Supreme Court of Illinois seems to us to have taken a step backward, in the case of Calkins v. Calkins, recently decided. It seems, from the opinion filed in that case, that the question arose upon the attestation of a will. The facts as stated in the opinion are as follows: The subscribing witnesses testified that the will was prepared by the witness Harris, and was signed by the testator at nine or ten o'clock in the evening; that the testator was lying in bed with a broken hip; that after affixing his mark to it, he, in response to a question by Dr. McNair, the executor, requested said witnesses to witness it; that they took the will and went into an adjoining room, out of the presence of the testator and outside the range of his vision, where it was physically impossible for him to see them or the will, and sat down by a table and wrote their signatures; that Mr. Harris then took the will and they went back into the room where the testator was; that Mr. Harris then read the will to the testator, including the signatures, and showed them to him, and he said it was all right. The will being offered in evidence was objected to by the appellants on the ground that it was not executed in accordance with the statute, and was not attested in the presence of the testator or within his sight or view or within the possible range of his vision. The court overruled the objection to the evidence showing the above and admitted the will in evidence.

The court went on to say: "It must be born in mind that the question, what will constitute a valid will devising property or a valid attestation of such an instrument, is legislative, and that the only legitimate function of the court is to declare and enforce the law as enacted by the legislature. The office of the court is to interpret the language of the legislature, where it requires interpretation, but not to annex new provisions or substitute different ones. The statute requires that all wills, testaments or codicils shall be attested in the presence of the testator or testatrix, by two or more credible witnesses, and if we should attempt to change that provision so as to authorize an attestation out of the presence of the testator or testatrix, either on account of a desire to sustain a particular will or because we regard a subsequent acknowledgment by the witnesses or ratification or approval by the testator just as good and effective as an attestation according to the statute, we should justly be charged with offensive judicial legislation." It is hard to see how such a determination could come from a judge who is supposed to have a comprehensive view of the law which is made for practical uses. Even in the interpretation of statutes the courts should and do take into consideration the nature of the object aimed at. The object is to surround the signing and attesting of wills in such a practical way that frauds may not be perpetrated, at the same time, to give the testator the fullest benefit possible, in order that his will may not be defeated.

It is fair to presume that the first question considered by the legislature, in the course of the enactment of the statute in question, was that, the law should not be so interpreted as to defeat the wish of the testator. It is hardly possible to conceive that the legislators, who were responsible for the statute in question, did not realize that, by leaving out the word "subscribed," which was a departure from the old English law, upon which all the statutes of our states are based in this respect, should have not realized what they were about. And it is just as hard to conceive that by the change they made in the statute in question, they did not intend to make such a change as would cause the courts to place a different interpretation upon that law from that the courts had placed upon those statutes which contained the word "subscribed" in the presence of the testator, etc., therefore, when the learned judge who wrote the opinion in the principal case says that, "the only legitimate function of the court is to declare the law as enacted by the legislature," he is bound to take into consideration that from the old English law

the requirement that the "will must be subscribed in the presence of the testator" is left out of the Illinois statute. This leaves the word attest to be interpreted in view of the fact that the legislature has declared, in effect, that the word subscribed in the presence of the testator is not necessary. It then remains for the courts to give construction to the word attest with these considerations in view. Then, it follows as the night the day that attest, means only witnessed in the presence of the testator.

In the case at bar there can be no question but that the will was witnessed fully in the presence of the testator. The interpretation placed on the statute by the majority opinion, is that which has been placed on those statutes which retain the word subscribed. It is manifest, then, that such construction ignores the significant change in the wording of the statute.

The previous opinions of the Illinois court do give significance to this change. The idea expressed in the majority opinion that fraud might be perpetrated by holding to the old opinions, is not half so much to be feared, as that the will of a testator might much more often be defeated by the narrow construction given by the court. And this must have been in the minds of the legislators when the change from the English law was made. So to give effect to the statute the court should not have departed from the opinions of Gibson v. Nelson, 181 Ill. 123, *In re* Tobin, 196 Ill. 484. These former opinions not only give proper effect to the statute in question but it seems to us is that which must appeal to reason, and we greatly commend the language of the Supreme Court of Minnesota in the case of Cunningham v. Cunningham, 51 L. R. A. 642, 645, where it says: "The whole affair, from the time he signed the will himself, down to and including his expression of approval, was a single transaction; and no narrow construction of this statute, even if it has met the approval of courts, should be allowed to stand in the way of right and justice, or be permitted to defeat testator's disposition of his own property."

There are enough conflicts in the opinions of the Illinois courts now, to be matter of much complaint by the bar, which the retention of opinion in the principal case would add to.

NOTES OF IMPORTANT DECISIONS.

ASSAULT—SURGICAL OPERATION UNAUTHORIZED.—In the case of Mohr v. Williams (Minn.), 104 N. W. Rep. 12, the facts were as follows:

Plaintiff consulted defendant concerning a difficulty with her right ear. Defendant examined the organ and advised an operation, to which plaintiff consented. After being placed under the influence of anæsthetics, and when plaintiff was unconscious therefrom, defendant examined her left ear, and found it in a more serious condition than her right, and in greater need of an operation. He called the attention of plaintiff's family physician to the conditions he had discovered, who attended the operation at plaintiff's request, and finally concluded that the operation should be performed upon the left instead of the right ear, to which the family physician made no objection. Plaintiff had not previously experienced any difficulty with her left ear, and was not informed prior to the time she was placed under the influence of anæsthetics that any difficulty existed with reference to it, and she did not consent to an operation thereon. Subsequently, on the claim that the operation seriously impaired her sense of hearing and was wrongful and unlawful, she brought this action to recover damages for an assault and battery.

The court found that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anæsthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The contention of defendant that the act complained of did not amount to an assault and battery is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there

was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1 Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 50 N. W. Rep. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

ADVERSE POSSESSION — ABANDONMENT. — A purchaser located a certain tract of land, cleared, fenced, and planted it to fruit trees, etc. He continued to so occupy it for about nine years, when he procured a survey to be made, which showed that the boundaries of the land as located extended over the land of adjacent owners. He then improved the land with reference to the new survey, and removed the improvements from the strip outside the boundaries. Two years later he placed a house on the strip. Upon the above state of facts the Supreme Court of Washington, in the case of Noyes v. Douglass, 81 Pac. Rep. 724, held that the claimant did not acquire by adverse possession of the strip outside the boundaries fixed by the survey, and that there was an abandonment of the strip outside of the boundaries fixed by the survey within the statutory period of ten years fixed for acquiring land by adverse possession. This is in pursuance of the decisions of the Washington court in the cases of Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. Rep. 1071, and Wilcox v. Smith (Wash.), 80 Pac. Rep. 803, where the rule is stated as follows: "If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseisure; but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse." This is, unquestionably, good sense. In the case of Murray v. Romine (Neb.), 82 N. W. Rep. 318, the court held that where defendant's grantor held possession of a piece of land several years without color of title, pasturing and partly fencing it, and then transferring it to defendant, who occupied it by pasturing cattle, cutting hay, and building additional fences; and such possession continued for more than ten years, that it constituted a right to title by adverse possession. The distinction between the above and the principal case is that in the principal case there was evidence of an abandonment, while there was an open, notorious, continuous, and adverse possession without interruption, with acts of ownership in the latter case. These cases seem often difficult to determine, and in the principal case the *nisi prius* judge's opinion was reversed. We presume he was influenced by the opinion of the Washington supreme court in the case of Flint v. Lang, 12 Wash. 342, 41 Pac. Rep. 49, where a purchaser of a city lot built a fence around three sides of it (the land being inaccessible from the fourth side on account of the roughness of the ground), cleared it of brush and timber, a considerable quantity of which was on it, and the surrounding lots, and planted shrubbery thereon. It was held sufficient to constitute a good title, while in the case of Carroll v. Gillion, 33 Ga. 539, it was held that the possession of land was not sufficiently open and notorious to extend an inclosure on adjoining land over the line of another lot some ten or fifteen feet wide, and taking in such inclosure a strip of land of that width and running half across the lot under a claim of title. Nor was it considered sufficient in the case of Royall v. Lisle, 15 Ga. 545, 60 Am. Dec. 712, where a cow pen was built on the boundary line separating two lots of land, and immediately contiguous to defendant's land, occasionally felling trees, and permitting cattle to range over the uncultivated land. There is no end to the cases on this subject. We have cited some of those which encroach on the limits.

THE DOCTRINE OF IMPUTED NEGLIGENCE, AS BETWEEN AN INFANT, NON SUI JURIS, AND ITS PARENT OR GUARDIAN.

It is well settled that an infant of tender years is deemed in law not possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its own safety.[1] But there is a sharp conflict of opinion between courts of last resort, as to whether the negligence of the parent or guardian having the custody and control of the infant, in exposing it to danger from the negligence of others, whereby it is injured, can be attributed to such infant so as to defeat its right of recovery therefor. A part of the confusion which we find among the reported cases upon this subject, is caused by the courts' losing sight of the point that there is a different and distinct rule applicable to cases where the action is brought by the parent or guardian for the death of the child or ward, and those cases where the child sues for its own injury. In cases of the former class, where the suit is brought, not by the child himself, or by another in his behalf, but by the child's parent; or by one standing *in loco parentis*, and having a legal interest in his case, it is well settled that the negligence of the parent will defeat a recovery. The reason for this is apparent, and has been uniformly recognized and sanctioned. The parent in these cases attempts to found an action for damages on his own negligence and wrong, which would be manifestly unjust, as well as against principle and authority. There is no conflict among the decisions upon this question.[2]

The cases in which the question of the negligence of the parent or guardian as a bar to the child's right of action enters, have been divided into two classes: First, where the parent was present at the time of the injury and his negligence actively contributed to the accident; second, where the negligence of the parent might be regarded as merely passive, as where he did not exercise sufficient care to keep the child out of danger. We will examine some of the leading decisions coming under the second class, with a view to ascertaining what the true law is.

The New York Rule.—The rule imputing to a child of tender years the negligence of its parent, guardian, or custodian, was introduced into the law of this country by the case of Hartfield v. Roper,[3] decided by the Supreme Court of New York in 1839. In that case, plaintiff, a child of about two years of age, was standing or sitting in the snow, in a traveled portion of a highway some distance from any house. The defendant was driving a sleigh, and the child was run over by the horses and injured. The plaintiff having recovered a verdict, a new trial was granted on the grounds, first, that the evidence failed to show negligence on the part of the defendant, and, second, that negligence on the part of the plaintiff's parents was clearly shown. The opinion of the court was that as the child was permitted by its custodian to wander into a position of such danger, it was without remedy for the injuries thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendant. The judicial theory was that the infant was, through the medium of its custodian, the doer in part of its own misfortune, and that consequently, by the force of the well known rule under such conditions, he had no right to an action. The court in part said: "An infant is not *sui juris*, he belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed that of the infant; his neglect the infant's neglect." The rule thus established has been adhered to, with slight modifications, by the courts of New York,[4] and has been adopted by the

[1] Shearman & Redfield on Negligence (3d Ed.), 48, and note 1; 2 Thomp. Neg. 1181; Beach, Cont. Neg. (2nd Ed.), Sec. 117; Central Trust Co. v. Wabash, etc., R. Co., 31 Fed. Rep. 246; O'Flaherty v. Union R. Co., 45 Mo. 70; Chicago, etc., R. Co. v. Gregory, 58 Ill. 226; Westbrook v. Mobile, etc., R. Co., 66 Miss. 560; North Penn. R. Co. v. Mahoney, 57 Pa. St. 187.

[2] Beach. Cont. Neg. (1st Ed.), Secs. 44-45; *Id.* (2nd. Ed.), Sec. 131; Chicago City R. Co. v. Wilcox, 138 Ill. 370, 21 L. R. A. 76; Erie City Pass. R. Co. v. Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Westbrook v. Mobile & O. R. Co., 66 Miss. 560; Shippy v. Au Sable, 85 Mich. 289; St. Clair St. R. Co. v. Eadie, 24 Ohio St. 670; 2 Thomp. Neg. 1191; Whart. Neg., Sec. 310; Bishop, Non-Cont. L., Secs. 578-580.

[3] 21 Wend. 613, 34 Am. Dec. 273.

[4] Mangan v. Brooklyn City R. Co., 36 Barb. 238, 38 N. Y. 455; Thurber v. Harlem Bridge R. Co., 60 N. Y. 326; Kunz v. Troy, 36 Hun, 617; Williams v. Gardiner, 58 Hun, 508. Followed also in Bubett v. Knickerbocker Ice Co., 110 N. Y. 507; Weil v. Dry Dock R. R. Co., 119 N. Y. 147.

courts of several of the other states,[5] and is usually known as the New York rule.

The English Rule.—In England it was declared in an early case,[6] that the negligence of an infant's guardian, was imputed to the infant and barred a recovery. In that case the plaintiff, an infant about five years old, was in charge of his grandmother, who purchased tickets for both at a station with the intention of taking the train to another point on said line of railway. In crossing the track to reach a platform, they were run down by a train under circumstances of concurrent negligence on the part of the grandmother and the servants of the company. The grandmother was killed and the plaintiff seriously injured. The court held that the action could not be maintained, because of the legal "identity" of the infant plaintiff with his guardian or custodian, whose negligence would be imputed to the child.

States Upholding New York Rule.—In a Maine case, the negligence of a father in permitting a ditch, which had been opened by the owner of the property on which he lived, and ran between his house and the closet, to remain open for an unreasonable time, was imputed to his minor child, so that it prevented a recovery by such child, from a third person, where the child fell into the ditch and was injured while attempting to return from the closet to the house after dark.[7]

The case of Fitzgerald v. St. Paul, Minneapolis & Manitoba Railway Company,[8] was an action to recover for injuries sustained by the plaintiff from being run over by a freight train of the defendant. At the time of the injury the plaintiff who was then eighteen months old, had wandered from his father's house and upon the railway track unobserved by his father, in whose care the child then was. The defendant was charged with negligence, both in the operating of the train, and in not having fenced its tracks at the place of the accident. The defendant denied its own negligence and alleged that the accident was caused by the negligence of the father of the plaintiff in suffering the child to be upon the track. It was claimed that the negligence of the father in the care of his child, was imputed to the latter and barred a recovery. It appeared upon the trial of the case that there was evidence tending to show both negligence on the part of the defendant in the management of the train, and on the part of the father in the care of his child. Upon appeal to the Supreme Court of Minnesota, Judge Dickinson, speaking for the court said: "The question involved in this case, as to the contributory negligence of the parent or person standing *in loco parentis*, barring a recovery by an infant for the negligence of another, is one upon which there is a decided conflict of authority. It has been so fully considered by both courts and commentators that there is little reason to further discuss it. The majority of this court adopt, as sounder in principle and more equitable in practice, the doctrine of those cases which hold that the consequences of negligence on the part of the parent, or other person rightfully having charge or control of an infant *non sui juris*, and having in law a keeper, to whose discretion in the care of his person he is confided, the negligence of such custodian must, as regards third persons, be held in law the negligence of the infant."

In a Massachusetts case,[9] the court held, that the negligence of the custodian of a child too young to be capable of caring for itself, in permitting it to go improperly attended upon a public street, would be imputed to the child, in a suit by it to recover damages for injuries inflicted upon it, while in the street, through the negligence of a third person.

Modifications of the New York Rule.—Although the New York rule has been tenaciously adhered to in several states, as sound in principle, the modern tendency has been to modify it, and to limit its application as far as possible, consistently with the adjudged cases. Accordingly it has been held that the doctrine of imputable negligence has no

[5] Meeks v. Southern Pac. R. Co., 52 Cal. 602; Hathaway v. Toledo, etc., R. Co., 46 Ind. 25; R. R. Co. v. Vining, 27 Ind. 513. But see 151 Ind. 42; Leslie v. Smith, 152 Mass. 924; Leslie v. Lewiston, 62 Me. 468.

[6] Waite v. North-Eastern R. Co., 1 El. Bl. & El. 719.

[7] Leslie v. Lewiston, 62 Me. 460; Calahan v. Bean, 9 Allen, 401. Where the father's negligence before the accident, which contributed to produce the injury, was held to bar a recovery by the infant.

[8] Fitzgerald v. St. Paul, Minneapolis & Manitoba R. Co. (Minn.), 43 Am. Rep. 212. The court in this case follows closely the rule in Hartfield v. Roper, 21 Wend, 615, 34 Am. Dec. 273.

[9] Casey, by next friend, v. Smith, 9 L. R. A. 259 (Mass.). See also Gibbons v. Williams, 135 Mass. 335; Lynch v. Smith, 104 Mass. 52.

application in a case where notwithstanding negligence on the part of the parents in permitting their child to be exposed to peril, the child itself exercised due care.[10] This modification has been recognized in the state of New York, the very state where the rule itself was first announced. In a case in that state, where the injured child was sent into the street in charge of a child nine and one-half years old, it was held that if the injured child exercised due care, and the injury was caused solely by the negligence of the defendant, there was liability without regard as to whether or not it was negligence in the parents to allow the child to go with so young an attendant.[11]

States Holding Against the New York Rule.—Although the rule as announced in Hartfield v. Roper, has received the sanction of the highest courts of several states, yet its correctness has been doubted and its reasoning severely criticised in many other jurisdictions. As early as 1850 the reasoning of that case was expressly repudiated by Redfield, J., speaking for the Supreme Court of Vermont,[12] while Chief Justice Brickell of Alabama thus severely criticises the case: "The rule announced by the case of Hartfield v. Roper, seems repulsive to our sense of justice, that, because the parent is negligent of his child, others may with impunity be equally negligent of its helplessness and equally indifferent to its necessities."[13]

In an Indiana case,[14] the same being a suit for personal injuries sustained while the plaintiff was five years old, the court, after an exhaustive review of the authorities, says: "The negligence of the parents of an infant of such tender years as incapacitates it to exercise due care, cannot be imputed to the child as contributory negligence of the child in an action by the child for damages caused by the negligence of the defendant." This decision directly overrules several earlier cases in that state, which seem to have followed the New York rule.[15]

In the case of Newman v. Phillipsburg Horse Car Railroad Company,[16] Chief Justice Beasley thus disposes of the question as to whether the negligence of the infant's parents could be imputed to the infant, so as to defeat a recovery: "In fact, this doctrine of the imputability of the misfeasance of the keeper of the child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism (Hartfield v. Roper) it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage.' 9 Vin. Abr. 374. Nothing could be more to the prejudice of an infant than to convert, by conclusions of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The sensible and legal doctrine is this: an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrong-doers to be answerable to a person who is incapable either of self protection or of being a participator in their misfeasance."

The Supreme Court of North Carolina,[17] in speaking of this doctrine, says this doctrine is "an invention of the Supreme Court of New York," and that court doubts whether the question has ever been fully argued or presented anywhere. It then cites from Shearman and Redfield, where that author says "that the last of the long series of so-called decisions on this point is like the first, a mere dictum, uttered without hearing argument and without consideration."

[10] O'Brien v. McGlinchy, 68 Me. 552; Lynch v. Smith, 104 Mass. 57, 6 Am. Rep. 188; Donahoe v. Wabash, etc., R. Co., 83 Mo. 543.

[11] Ihl v. 42nd St. & Grand St. Ferry R. Co., 47 N. Y. 317. The same rule being followed in McGarry v. Loomis, 63 N. Y. 107.

[12] Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67.

[13] Gov. St. R. Co. v. Hanlon, 53 Ala. 82.

[14] City of Evansville v. Senhenn, 151 Ind. 42.

[15] City of Evansville v. Senhenn, 151 Ind. 42 overrules Lafayette, etc., R. Co. v. Huffman, 28 Ind. 287, and Hathaway v. Toledo, etc., R. Co., 46 Ind. 25.

[16] Newman v. Phillipsburg Horse Car R. Co., 52 N. J. Law, 450, 8 L. R. A. 842.

[17] Bottons v. Seaboard, etc., R. Co., 114 N. Car. 699, 24 L. R. A. 784.

In the earlier Missouri cases, that court seems to assume that the child might be barred by the parents' negligence, but in the later cases it was decided that the negligence of the mother in permitting the child to go into the street without a proper attendant would not prevent a recovery, nor will the fact that the attendant, a mere child, was also negligent.[18]

The other states repudiating the New York rule are Ohio,[19] Nebraska,[20] Illinois,[21] New Hampshire,[22] Mississippi,[23] Michigan,[24] Louisiana,[25] Georgia,[26] Texas,[27] Tennessee,[28] Pennsylvania,[29] and Alabama.[30]

Text-writers Opposing New York Rule.—The ruling in Hartfield v. Roper has been the subject of severe and unreserved criticism by the leading text-writers.[31] Mr. Beach, after citing cases to show that when a donkey is carelessly run down in the highway, where he is negligently exposed by the owner, the defendant is held liable; or where oysters are negligently placed in a river bed, it is an injury redressible at law for a vessel negligently to disturb them, sarcastically adds: "It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect." Mr. Bishop, in his recent treatise of Noncontract Law, sec. 582, says:

"This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor, or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by the new doctrine, after a child has suffered damages, which confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother or mother's maid happens to be the one making the contribution. In these and other respects it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law."

After an examination of the authorities, *pro* and *con*, the true rule seems to be this: The negligence of an infant's parent or guardian is not imputed to such infant so as to defeat its right of recovery for an injury caused by the negligent act of a third party. Those decisions which hold that the rights of the infant are identified with or dependent upon those of its parent, and that upon the principle of agency the act of the parent must in law be deemed that of the child, are, we believe, wholly unsound.

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[18] Frick v. St. Louis, K. C. & N. R. Co., 75 Mo. 542; Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600. But see the later case, Winter v. Kansas City, etc., R. Co., 99 Mo. 509.

[19] R. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175.

[20] Huff v. Ames, 16 Neb. 139, 49 Am. Rep. 716.

[21] Chicago City R. Co. v. Wilcox, 138 Ill. 370.

[22] Bisaillon v. Blood, 64 N. H. 565.

[23] Westbrook v. R. R. Co., 66 Miss. 590.

[24] Shippy v. Au Sable, 85 Mich. 280.

[25] Westerfield v. Lewis, 43 La. Ann. 63.

[26] Ferguson v. Columbus, etc., R. Co., 77 Ga. 103.

[27] Williams v. Texas & P. R. Co., 60 Tex. 205.

[28] Whirley v. Whiteman, 1 Head. 610.

[29] North Penn. Ry. Co. v. Mahoney, 57 Pa. 187.

[30] Government St. R. Co. v. Hanlon, 53 Ala. 70.

[31] See elaborate discussion and criticism in Wharton on Neg. (2nd Ed.), Secs. 313-314; Bishop, Non-Cont. L. Sec. 581; Beach, Contrib. Neg., 1st Ed., Sec. 38; *Id.* (2nd Ed.), Sec. 116; 1 Shearm. & R. Neg. 75; Whart. Neg., Sec. 311; 2 Wood Railway Law, p. 1284; Whittaker's Smith, Neg., Secs. 412-415; Deering, Neg., Sec. 28; Patterson's Railway Accident Law, 1284; Pol. Torts, 297-300; Cooley, Torts, 818; Bigelow, Torts, 319; Addison, Torts, 576; Notes in 3 Lawson, Right's Rem. & Pr., Sec. 1210; 4 Am. & Eng. Ency. of Law, 82-99.

MASTER AND SERVANT—ASSUMED RISK IN RIDING ON OUTSIDE OF CAR.

MILBOURNE v. ARNOLD ELECTRIC POWER & STATION CO.

Supreme Court of Michigan, June 6, 1905.

Where an employee of an electric railway company elected to ride on the outside of a house car at the close of the work, in order to watch the tools, with the acquiescence of defendant's assistant superintendent, and was injured in a collision between the train on which he was riding and loaded gravel cars negligently left on a spur track, he was not guilty of contributory negligence, as a matter of law, because of the position he assumed, the danger of collision being not one he was required to anticipate.

Where, in an action for injuries to an employee, while riding on an electric railway construction train, by a collision, it appeared that the shock of the collision was much greater than that ordinarily resulting from cars coming together on the siding, plaintiff did not assume the risk as a matter of law.

CARPENTER, J. Plaintiff brought this suit to recover compensation for injuries received while in defendant's employ. He recovered a verdict in the court below. On a motion for a new trial the lower court set aside the verdict on the ground that, under the testimony, a verdict should have been directed for defendant. Upon the stipulation of the parties that "if the evidence offered" showed, "as a matter of law, that the plaintiff was not entitled to a judgment, that a new trial was not desired by plaintiff," and that, upon the other hand, "if the evidence warranted" the jury in finding a verdict for the plaintiff, the judgment heretofore entered for the plaintiff should stand affirmed, the trial court entered judgment for the defendant, "subject, however, to the right of the plaintiff to have said judgment reviewed by the supreme court."

The record then presents this single question: Did plaintiff make a case which entitled him to take the judgment of the jury? For the purpose of determining this question, it is obvious that we must consider that testimony from the point of view most favorable to the plaintiff. Defendant was a foreign corporation constructing the electric road between Lansing and St. Johns. Plaintiff was a common laborer in defendant's employ. The day of his injury, November 29, 1901, he had been employed in the work of construction about six miles north of Lansing. His injury occurred after dark by a collision between the construction train of defendant, upon which he was being carried home, and a train of cars loaded with gravel, also belonging to defendant. The collision occurred on a spur track situated on the east side of the main track, at a place called "Hurd's gravel pit," about three miles north of Lansing. The train upon which plaintiff was being carried consisted of a locomotive pushing ten empty flat cars and pulling a single way car. This way car may be described as a flat car with a house built upon it. This house did not occupy the entire surface of the car. There was left an uncovered space five or six feet long at the front end. Plaintiff, when he boarded the train, instead of accompanying his fellow workmen inside the house, seated himself on this space, and with his left foot braced against a bolt which projected about an inch upward from the front end of the car. The tools used by plaintiff and his fellow workmen also occupied this space. Defendant's assistant superintendent or roadamster, who was on the train, told plaintiff that he had "better go inside" the way car. Plaintiff replied, "I got up here to watch the tools to see that none of them fell off, and I have a good seat." The roadmaster said, "All right, then," and went on the engine. According to the custom of defendant and the orders of defendant's manager, the empty cars on this train were to be left on the spur track at the gravel pit before mentioned. When the train reached that point, it went on said spur for the purpose of leaving said empties, and, while going at quite a rapid speed, it collided with the cars loaded with gravel, also situated on said track, and plaintiff was thrown from the car and seriously injured.

It is to be inferred from the testimony that the cars standing on said spur track, ten or eleven in number, had been loaded with gravel that day while situated on another spur a few feet south of the spur above described, but on the west side of the main track, and that late in the afternoon, by the order of defendant's general superintendent and manager, a Mr. Quick, they had been moved to said east spur. Until the very day of plaintiff's injury, this east spur had been a siding long enough to hold all the cars of defendant, 22 in number. That day, to the knowledge of plaintiff and those in charge of the train on which he was riding, it had been made into a spur, and, as a result, shortened so that it would only hold eleven or twelve cars. Before it was shortened, all the cars were frequently placed on said siding. No light was placed on said loaded cars, and no notice was given by Mr. Quick to those in charge of the train upon which plaintiff was riding that the loaded cars had been placed on said spur track.

It is contended by defendant that from these facts no inference of negligence can be drawn that plaintiff was guilty of contributory negligence, and that he assumed the risk of the danger which resulted in his injury. It is settled by our decisions (see Harrison v. Railroad Co., 79 Mich. 409, 44 N. W. Rep. 1034, 7 L. R. A. 623, 19 Am. St. Rep. 180; Palmer v. Railroad Co,. 87 Mich. 281, 49 N. W. Rep. 613; La Barre v. Railroad Company [Mich.]. 94 N. W. Rep. 735) that the general superintendent, Quick, was a vice principal, for whose negligence defendant is responsible. We think from this evidence the jury might infer that Quick was negligent in placing these loaded cars on this spur, and in failing to give notice of that fact to those in charge of the train upon which plaintiff was riding. In stating this conclusion, we have not overlooked defendant's contention that there was no necessity for notice to those in charge of the train, because they knew that these loaded cars would be on one or the other of the two spurs, and that they were frequently placed on the east spur when it was a siding sufficiently long to hold all the cars. We do not think that the court can say that these facts dispensed with the necessity of notice. Those in charge of the train might very well believe, and it is apparent that they did believe, that because of the shortening of the track, and their orders and custom to put the empty cars there, that they would find it safe for that purpose.

When plaintiff chose to remain outside the

house on the way car, was he guilty of contributory negligence? It may be conceded, that in consequence of making this choice, plaintiff was injured. This circumstance has, however, in my judgment, no material bearing on the question of his contributory negligence. In determining his choice, plaintiff was bound to take into consideration such dangers, and such dangers only, as an ordinarily prudent person might apprehend, and surely no ordinarily prudent person would have apprehended the collision. This statement of the rule is not in conflict with the proposition, in support of which cases are cited in the accompanying opinion of Justice Hooker, that one who is acutually guilty of negligence in choosing an unsafe position cannot recover because he is there injured by a danger which he did not anticipate. The proposition which it is claimed those authorities establish would prevent plaintiff claiming that, though negligent, he might recover because his injury was caused by an unanticipated danger. No such contention is involved in the reasoning of this opinion. The proposition which it is claimed those cases establish, that one who has negligently chosen a position cannot recover for an injury there resulting from an unanticipated danger, is radically different from the proposition asserted by me—a proposition which I cannot but regard as elementary—that one will not be adjudged negligent because he did not anticipate a danger which he could not anticipate. I am aware of no authority which declares a contrary principle. Can we say that no ordinarily prudent person would have taken the course plaintiff took? To do this, we must say that the danger to which this position exposed him was such that no ordinarily prudent person would under the circumstances have risked it. The danger that was risked, the danger which an ordinarily prudent person should have apprehened, was that of falling or being thrown off the car by its ordinary management. The risk of that danger was undoubtedly assumed by plaintiff, but he would not therefore be guilty of contributory negligence, unless no person of ordinary prudence would have assumed that risk. I do not think it can be said as a matter of law that no person of ordinary prudence would have assumed it. Such a person might reasonably suppose, as presumably plaintiff supposed, that he could protect himself from such dangers by bracing his foot against the projecting bolt.

In considering the question of plaintiff's contributory negligence, we should bear in mind the circumstance under which plaintiff acted. The fact that one takes a risk in the performance of a duty is a circumstance entitled to great weight in determining whether his conduct was negligent. See Eckert v. Railway Co., 43 N. Y. 502, 3 Am. Rep. 721; Spooner v. Railway Co., 115 N. Y. 22, 21 N. E. Rep. 696. Can we infer that plaintiff remained outside the way car in the performance of a duty? That depends upon the inference to be drawn from the conversation between plaintiff and his superior, defendant's assistant superintendent. The assistant superintendent told plaintiff he had better go inside. Plaintiff replied, "I got up here to watch the tools to see that none of them fell off, and I have a good seat." The roadmaster said, "All right, then," and plaintiff remained in his position. In considering this conversation, we must bear in mind the elementary rule that, if susceptible of more than one construction, its meaning is to be determined by the jury, and not by the court. See McKenzie v. Sykes, 47 Mich. 294, 11 N. W. Rep. 164. I do not deny that from this conversation the jury might have inferred that defendant merely acquiesced in plaintiff's determination to ride on the open car. But I cannot assent to the contention that this is the only inference they could legitimately draw. By saying, in answer to the direction to go inside, "I got up here to watch the tools to see that none of them fell off, and I have a good seat," the plaintiff merely explained his purpose; he did not assert a settled determination to remain in that position. At least, the jury may have found that he did not.

By replying, "All right," to plaintiff's proposal to stay and watch the tools, the assistant superintendent not only acquiesced in plaintiff's remaining where he was, but also furnished evidence of an approval of his purpose in remaining. Plaintiff proposed to stay there and watch the tools; that is, I take it, to prevent their loss or damage From defendant's answer, "All right," the jury certainly could have inferred that defendant approved his purpose, and thereby ratified this self-assignment to a new duty. If, when plaintiff had said, "I will stay here and watch the tools," defendant's superintendent had replied, "I am glad you suggested watching those tools; they need to be looked after; stay here and see that they do not get lost or damaged"—plaintiff's assignment to a duty outside the way car would be clear. It is true that defendant's superintendent did not use the supposed language, but the jury might have inferred from the language he did use that is precisely what he meant, and what the plaintiff supposed and had a right to suppose that he meant. From this conversation, it might therefore be inferred that plaintiff was directed to stay where he was and there perform a duty for defendant. The fact that plaintiff remained in this position to perform a duty clearly distinguishes the case from that of a passenger who, for no other reason than that of his personal gratification, rides on the platform of a car by the acquiescence of a trainman.

In support of the claim that plaintiff was guilty of contributory negligence, we are referred to Glover v. Scotten, 82 Mich. 369, 46 N. W. Rep. 936; Wilson v. Mich. Cent. R. R. Co., 94 Mich. 20, 53 N. W. Rep. 797; Benage v. Railway Co., 102 Mich. 76, 60 N. W. Rep. 286; Nieboer v. Detroit Electric Ry. Co., 128 Mich. 486, 87 N. W. Rep. 626; Railway Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Hickey v. B. L. & R. Co., 14 Allen

429; Posey v. Texas R. R. Co., 102 Fed. Rep. 236, 42 C. C. A. 293; St. Louis Ry. Co. v. Schumacher, 152 U. S. 77, 14 Sup. Ct. Rep. 479, 38 L. Ed. 361; Warden v. Louisville R. Co. (Ala.), 10 So. Rep. 276, 14 L. R. A. 552. In Glover v. Scotten, Warden v. Louisville R. Co., and Railway Co. v. Jones, *supra*, it was held negligence for a switchman to ride on the pilot of an engine. In Wilson v. Mich. Cent. R. R Co., *supra*, it was held negligence for a brakeman to crawl over or under the bumpers of a moving car. In Benage v. Railway Co., *supra*, it was held negligence for a brakeman to ride on a drawhead while a train was moving. In Nieboer v. Detroit Electric Ry. Co., *supra*, it was held negligence for a passenger to ride on the deadwood of a street car, and that the conductor had no authority to permit him to ride there. In Hickey v. B. L. & R. Co., and Posey v. Texas R. R. Co., *supra*, it was held negligence for a passenger to ride on the platform of a car in which he was being carried. In St. Louis Ry. Co. v. Schumacher, *supra*, it was held negligence for an employee to ride on the platform of a flat car with his feet hanging over the side contrary to instructions. In each of these cases the plaintiff assumed a danger greater and more obvious than the case at bar. If these authorities have any application, it must be because of the principle there asserted (see Glover v. Scotten, *supra*): "When a safer place is provided, and an employee chooses a more dangerous one, they do it at their own risk." I think that this principle was stated with reference to the particular facts of that case. But even if it be regarded as one of universal application, it cannot, in my judgment, be applied in this case. When it was agreed between plaintiff and defendant that the former should stay outside and watch the tools, he had no right to go inside—he was directed to stay outside. There was no longer any safer place for him. I do not see how we can hold plaintiff to be guilty of negligence without holding that a failure to adopt the safest course of conduct is negligence. We have distinctly held that such failure is not negligence. See Railway Co. v. Gildersleeve, 33 Mich. 133. We think this case comes under the rule, so often declared, "that the question of plaintiff's contributory negligence should be submitted to the jury, * * * where candid and intelligent men might reach different conclusions upon the facts." See Becker v. Street Ry. Co., 121 Mich. 580, 86 N. W. Rep. 581; Haines v. Railway Co., 129 Mich., at page 483, 89 N. W. Rep., at page 353, and the authorities there cited. Neither do we think that the court can say, as a matter of law, that plaintiff assumed it unless we can say that the risk was incident to his employment, or that he knew or should have known that the loaded cars were on the spur. See Bradburn v. Railroad Co. (Mich.), 96 N. W. Rep. 929. If his injury resulted from the negligence of his employer, the risk was not incident to plaintiff's employment. It does not avail defendant to say that plaintiff assumed the risk of the shock resulting from cars coming together on the siding "with customary force." For, from the evidence, it may be inferred that the shock of the collision was much greater than the shock ordinarily resulting from cars coming together on the siding. It certainly cannot be said that plaintiff knew that the loaded cars were on the siding. And if those in charge of the train were not bound to know that they were there—and we have held that they were not—neither was plaintiff bound to know it.

We conclude, therefore, that the learned trial judge erred in entering judgment for the defendant. Plaintiff is entitled to have that judgment reversed, and a judgment entered on his verdict. It is so ordered.

NOTE.—*Whether Servant is Guilty of Contributory Negligence for Putting Himself in Dangerous Position Where a Safer Place is Provided.*—The question discussed in the principal case is one which has provoked much litigation. It would seem to be a reasonable rule that when the master has provided his servants with a safe place to work and such servants should voluntarily put themselves in a more dangerous position, even with the master's consent, the master should not be liable for injury resulting to such servant, even from his (the master's) own negligence, provided such injury would not have occurred if the servant had remained in the place provided for him by the master.

The authorities substantiating the rule we have laid down in the preceding paragraph are well briefed in the dissenting opinion of Hooker, J., in the principal case, which dissenting opinion is as follows: "I do not concur in a reversal of this cause, for the reason that in my opinion the testimony conclusively shows that the plaintiff assumed the risk of riding upon the end of the car, but for which he would have suffered no injury. He is justly chargeable with contributory negligence under the rule of the following cases cited by counsel: Hickey v. B. L. & R. Co., 14 Allen, 429; Posey v. Tex. & P. R. Co., 102 Fed. Rep. 236, 42 C. C. A. 293; Glover v. Scotten, 82 Mich. 369, 46 N. W. Rep. 936; R. R. Co. v. Jones, 65 U. S. 439, 24 L. Ed. 506. See other cases cited in defendant's brief: Wilson v. M. C. R. Co., 94 Mich. 20, 53 N. W. Rep. 797; Benage v. R. Co., 102 Mich. 76, 60 N. W. Rep. 286; Fluhrer R. R. Co., 121 Mich. 217, 80 N. W. Rep. 23; Nieboer v. D. E. R., 128 Mich. 487, 87 N. W. Rep. 626. The case of Fluhrer v. R. R. Co. is closely analogous to the present one, and, in my judgment, identical in principle. Mr. Justice Grant, with the approval of the entire bench, quoted from Glover v. Scotten, as follows: "When a safe place was provided for switchmen to ride, and they chose to ride, in a more dangerous one, and always did so, that would not release them from contributory negligence." Warden v. L. & N. R. R. (Ala.), 10 So. Rep. 276, 14 L. R. A. 553, is a similar case to Glover v. Scotten, *supra*, which it cites approvingly, together with many other cases involving the same point. See Kresanowski v. N. P. R. Co. (C. C.), 18 Fed. Rep. 229; Doggett v. I. C. R. Co., 34 Iowa, 284; Flynn v. E. R. Co., 83 Wis. 238, 53 N. W. Rep. 494, George v. Mobile, etc., 109 Ala. 245, 19 So. Rep. 784; Wherry v. Duluth, etc., 64 Minn. 415, 67 N. W. Rep. 223. The case of St. Louis Ry. v. Schumacher, 152 U. S. 77, 14 Sup. Ct. Rep. 479, 38 L. Ed. 361 (opinion by Mr.

Justice Brown), is substantially on all fours with the present case."

"I understand that the question of defendant's negligence, in occupying the exposed place, should not be made to depend upon the probability of a collision. In none of the cases cited was there a probability of the accident that actually occurred, or, for that matter, any other accident. In the great majority of cases trains go through without accidents and are operated without casualty. Yet all kinds of accidents do happen, and courts do not hold that they must be anticipated before exposure to the possibility of them can be said to be negligent. In the minority opinion filed recently in the case of Morgan v. Lake Shore Ry. D. L. N. (Mich.), 101 N. W. Rep. 836, many cases are cited which hold that it is negligence *per se* for a passenger to voluntarily and unnecessarily stand upon the platform of a coach, and none of them intimate that it depends upon the question of his knowledge of unusual circumstances which contribute to or cause the accident. If contributory negligence cannot exist until it can be said that it is incurred with the knowledge of the particular facts which are to cause the impending accident, there can be no such thing as contributory negligence in a large class of cases where it has not heretofore been questioned. My understanding that if the act is hazardous, in the light of human experience, it is negligence which may become contributory if the injury could not have occurred but for such negligence, or is contributed to by such negligence. See Quinn v. R. R. Co., 51 Ill. 495; Camden & Atl. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120; Worthington v. Cent. Vt. R. Co., 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326; York v. Ry. Co., 84 Me. 117, 24 Atl. Rep. 790, 18 L. R. A. 60; Rolette v. Ry. (Minn.) 97 N. W. Rep. 431.

"In Warden v. Louisville R. Co., 10 So. Rep. 276, 14 L. R. A. 552, the Alabama supreme court held it to be negligence *per se* for a brakeman to unnecessarily sit on a crossbeam in front of an engine running between stations, where the injury was directly the result of a pilot colliding with a rail of a bisecting railroad. The court said: 'Not only so, but it was equally clear from the testimony that the casualty was directly the result of the pilot's colliding with a rail of a bisecting road, that no other part of the train or engine was injured, that no other of the several persons on the train was hurt, and that he would not have been hurt but for his having taken this position on the pilot. There being thus no doubt that plaintiff's presence on the pilot contributed proximately to the injuries he sustained, the main question in the case is whether his being there at the time of the accident was negligence *in se* on his part, and to be so declared by the court, as a matter of law. The authorities are believed to be uniform to the support of the affirmative of this inquiry. The investigations of the court and counsel have failed to disclose a single adjudged case to the contrary, while many courts are upon the record as holding, either by analogy or directly, that to ride upon the pilot or crossbeam in front of an engine while proceeding on its way along the line of its track, without justifying necessity therefor, involves *per se* such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but at the same time improper, positions on moving trains, voluntarily and unnecessarily, has been many times held to be contributory negligence as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good cause of action.'

"In B. & P. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, a case where a trainman rode on the pilot or bumper of an engine, while there was room for him in a box car provided for the purpose, and where he would have been safe, the court said: 'There was room for him in the box car, as there was room for the plaintiff here on the train: and none of those in the box car were hurt, as here all who remained on the cars escaped injury. It was held that, as the plaintiff would not have been injured had he used ordinary care, he was not entitled to recover, Justice Swayne observing: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."'

In Kresanowski v. N. P. R. Co. (C. C.) 18 Fed. Rep. 229, it was held "that the plaintiff himself so far contributed to his injury by his own negligence in placing himself in such a dangerous position that he could not recover; and that there being evidence that there was no room for the plaintiff on the tender, and that he had in effect been authorized or invited by the company to ride over the pilot, that the plaintiff being of age, and able to see and know the risks of the position, even the fact of such invitation and authorization would not justify him in placing himself in a position of obviously great risk and danger."

Our own case of Glover v. Scotten, 82 Mich. 369, 46 N. W. Rep. 936, is cited with approval in the Alabama case, and commented on as follows: "But the strongest support of this doctrine is found in the circumstances of a Michigan case, and the several decisions which were made in different actions which grew out of it. The facts were that a switchman in the employ of a railway company was killed. The engine upon which he was employed, and which was at the time engaged in swtching cars about the yard of the company, ran into a truck owned by the defendant, an individual having no connection with the railroad company, and driven by his teamster. The result of the collision was the death of the switchman, injury to defendant's teamster, and destruction of the truck and team. The switchman at the time of the collision was sitting on the crossbeam of the pilot, with his feet hanging over the 'cowcatcher.' * * * Several actions grew out of the transaction. The teamster sued the railroad company, counting on the personal injuries he sustained. The company was found negligent; the judgment went against it, which was paid. The railroad company also paid the owner for the loss of the truck and team. The personal representative of the dead switchman sued the railroad company in the Circuit Court of the United States, claiming that the death of his intestate resulted from the negligence of the railroad company in not ringing the bell or blowing the whistle for the crossing over which the truck was passing when the collision occurred, in not having a flagman there to keep the way clear, in obstructing the switchman's view of the crossing, etc. Judge Brown, now of the Supreme Court of the United States, before whom the case was tried, directed a verdict for the defendant, upon the ground that the switchman was guilty of contributory negligence in being at the time on the crossbeam of the pilot. The administrator of the switchman then sued the owner of the team and truck, and this last case went to the Supreme Court of Michigan, and was there determined against the plaintiff, who had re-

covered in the *nisi prius* court, on the ground that the trial judge had left it to the jury to say whether the switchman was guilty of contributory negligence, when the court itself should have determined that he was guilty of negligence which contributed to his death as a matter of law, and thus withdrawn that issue from the jury altogether. Grant, J., rendering the opinion of the court said: "Several questions are raised by the record, but the plaintiff's right to recover is barred by his decedent's contributory negligence, rendering a determination of the other questions unnecessary. There is no dispute about the facts. The judge found as a fact, and so charged the jury, that there was no testimony in the case that the deceased was obliged to ride upon the cowcatcher, and left it to the jury to determine whether or not this constituted negligence on his part. In the absence of proof, we cannot believe that any railroad company requires its switchmen, or any of its employees, to ride in so dangerous a place. There was a safer place for him to ride. He was neither required nor directed to ride in a position which every person of ordinary intelligence and observation knows was the most dangerous he could have chosen. The fact that upon switch engines switchmen rode standing upon the platform provided for them in front of the engine had no tendency to prove that the deceased was justified in riding in a sitting posture upon the cowcatcher of a road engine; nor would the fact that switchmen were in the habit of riding on the cowcatcher excuse the deceased, as between him and defendant. Yet the judge substantially left the jury to determine the question of contributory negligence by the determination of the question as to whether the deceased was riding in the usual and ordinary place upon the engine. If switchmen always rode there, still that fact would not take them without the rule of contributory negligence. When a safer place is provided, and employees choose a more dangerous one, they do it at their own risk. The difference in danger between standing on a platform of a regular switch engine and sitting on a cowcatcher with one's legs hanging over it is apparent. In the one case the switchman is ready to jump upon the approach of danger; in the other, considerable time must elapse before he could recover his standing position upon the pilot beam and put himself in readiness to avoid danger. In the present case deceased was the only one upon the engine who was injured. He chose the only place in which he could have been injured, and chose a sitting posture instead of a standing posture.'" In this Michigan case there was a collision not to be expected, and there was no suggestion of the theory that a man was not to be charged with contributory negligence unless he had notice of the danger. The case of Martin v. B. & O. (C. C.), 41 Fed. Rep. 125, is another case where an employee, unnecessarily in a place of danger, *i. e.*, on the platform, who was injured by an unforeseen collision, was chargeable with contributory negligence. See, also, Judkins v. R. Co., 80 Me. 417, 14 Atl. Rep. 735; Hickey v. Bos. & Low. R. R. 14 Allen, 429; Lehigh Valley R. R. Co. v. Greiner, 113 Pa. 600, 6 Atl. Rep. 246. This case arose over an accident caused by a collision. Martensen v. C. R. I. & P. R. Co., 60 Iowa 705, 15 N. W. Rep. 569.

"The federal supreme court has held to the same rule in R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506. It was applied to a laborer who rode on a pilot, rather than in a car provided for the purpose, as we have already shown; while, as already said the case of St. Louis, etc., v. Schumacher, 152 U. S. 79, 14 Sup. Ct. Rep. 479, 38 L. Ed. 361, is no distinguishable from the present case, and contains no hint that the effect of plaintiff's was any different because he did not know of exceptional conditions and dangers. We can only ingraft such a rule upon the law by overruling not only a large number of cases in the various state and federal courts, but the cases of Glover v. Scotten, Benage v. R. Co., 102 Mich. 73, 60 N. W. Rep. 286, and Neiboer v. R. Co., 128 Mich. 486, 87 N. W. Rep. 626. In both of the last-mentioned cases there were dissenting opinions, which took the ground that the question of contributory negligence depended upon the apparent, and not unforeseen, dangers. See dissenting opinions 102 Mich. 77, 60 N. W. Rep. 286, and 128 Mich. 491, 87 N. W. Rep. 626. But the doctrine was not accepted, but distinctly denied in both. See opinion of Long, J., 102 Mich. 76, 60 N. W. Rep. 286, and Grant, J., 128 Mich. 488, 87 N. W. Rep. 626, and authorities cited, including Glover v. Scotten, which is approved and followed in the former. The rule of Glover v. Scotten, has been applied in many cases. It was announced by a unanimous bench, and, until, the case of Benage, it does not seem to have been questioned. That was an extreme case in this, viz., that the nature of the accident was extraordinary, so much so that it afforded a plausible reason for the view taken in the minority opinion. But it was seen that the principle then announced, had it been adopted, would be forced upon us in all cases by inexorable logic, and it was deliberately discarded.

"It is claimed that the question is affected by the conversation between the plaintiff and the assistant superintendent, *i. e.*, the latter said, 'You had better go inside,' to which the former answered, 'I thought I would stay here and look after the tools; I have a good seat;' to which the former responded 'All right, then.' It is only upon the theory that this gives the jury the right to infer from these words that which they do not import, viz., that the assistant superintendent's answer, or his failure to insist upon plaintiff's going inside, relieved the plaintiff from the assumption of the risk and the consequent contributory negligence. It does not justify the inference of a request to stay and care for the tools, nor is it evidence of more than acquiescence in the determination of the plaintiff to ride on the open car, where he said he had a good seat, at his own risk. The case is not different from that of a passenger who rides on a platform. The trainmen seldom order such to go inside, yet the failure to do so does not relieve the passenger from injuries resulting therefrom. The rule is that, when one voluntarily and unnecessarily occupies the dangerous place, he is guilty of contributory negligence. There is nothing in the testimony to indicate that plaintiff did not voluntarily and unnecessarily occupy this place of danger, hence the jury should not be permitted to infer the contrary. Quinn v. R. R. Co., 51 Ill. 495; Camden v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120; Worthington v. Cent. Vt. R. Co., 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326. See opinion of Hooker, J., in case of Morgan v. Lake Shore, etc., Ry. Co. (Mich.), 101 N. W. Rep. 836, for other authorities.

"In the absence of any conversation, it is clear that no claim could be made that his act was not voluntary. The conversation actually had shows that the company's agent protested against his staying, *i. e.*, gave him warning that he better go inside. The plaintiff not only remained outside voluntarily, but rather insisted, on staying there. It is as though he begged the privilege. No further protest was made. The

assistant superintendent said, 'Very well, then;' in other words, 'Do so if you wish to.' The fact that plaintiff said he went there to watch the tools does not justify the assumption that he did not go there voluntarily and unnecessarily, or that he was even asked to stay and watch the tools, if that would in any case change his liability to answer for the negligence as his own voluntary act. Wiggins Ferry Co. v. Hill, 112 Ill. App. 476.

JETSAM AND FLOTSAM.

PROTECTION OF AUTHOR AGAINST INSOLVENCY OF PUBLISHER.

The protection of the rights of an author in royalties due him from the sale of his books is ordinarily a matter of considerable difficulty under our copyright laws when the title to the copyright is held by the publisher. To protect the author against the insolvency of his publisher, we had supposed that the only safety of the author lies in taking out the copyright in his own name and then making a conditional assignment to the publisher, carefully reserving his royalty rights. But a case which has recently been reported (*In re* D. H. McBride & Co., 132 Fed. Rep. 285), shows that this is not the only way in which an author's rights may be safeguarded. In that case the copyright of certain school text-books was held by the publisher, but, in the contract for royalties between the publisher and author, it was stipulated that on a failure of the publisher to perform his part of the contract the copyright should revert to and become the exclusive property of the author. It was further provided that no assignment of the copyright should be made by the publisher without the author's written consent. The publisher went into bankruptcy and the author instituted proceedings to reclaim the copyrights. It was held that the copyright could not be held by the trustee in bankruptcy as a part of the bankrupt's estate, and that the petitioner was entitled to have them assigned by the trustee in accordance with the contract. It was considered that the contract was a personal engagement between the author and publisher, involving trust and confidence which could not be assigned or delegated to another without the author's consent. The case was complicated by the fact that the books in question were of a denominational character, and this fact was given great importance in arriving at the conclusion that the contract was of a personal nature. It was said that "the development of the sales depended upon the character and relations of her [complainant's] publisher in the Catholic book trade. The exclusive market for the books was in parochial schools and convents under the control of the Roman Catholic Church. The religious affiliations and connections of the publisher became, therefore, of vital importance to the author, for under non-Catholic management, for instance, the peculiar influence required to introduce the books into these schools would be entirely lacking." This tends to narrow the scope of the decision very materially, but it is by no means certain that a contract between a publisher and author should not be considered a personal engagement in every case.—*Law Notes.*

CORRESPONDENCE.

SENTIMENTAL DAMAGES.

Editor of the Central Law Journal:

Apropos of your extract from *Solicitor's Law Journal*, headed Sentimental Damages, see Lewis v. Holmes, 109 La., 1030, also reported in L. R. A. In this case I recovered substantial damages ($575) for failure to deliver a bride's trousseau in time. The wedding dress was delivered in time, but four inches too short and had to be hastily lengthened. Four reception dresses were forwarded, uncut, so bride, like Flora McFlimsey, had nothing to wear at receptions.

Yours truly,

B. R. FORMAN.

New Orleans, La.

THE JUVENILE COURT OF COLORADO.

To the Editor of Central Law Journal:

Sir:—I read your able editorial in the CENTRAL LAW JOURNAL on the Juvenile Court and I want to thank you for it. I believe that eventually the courts will all recognize this new work as a part of the chancery practice, and I do not think that you can do a greater work for humanity than to continue to lend your efforts to bring this about.

It might interest you to know that for over two years every boy sent to the reform school from this city has gone alone, and not one has failed to keep his word.

With kindest regards, I am,

Sincerely yours,

BEN. B. LINDSEY.

Denver, Colo.

Judge Lindsey's theory is upheld. Max Anderson, one of the worst cases of a burglar, goes to Golden reformatory unattended although escape was easy. One of the most remarkable confirmations of Judge B. B. Lindsey's theory, that the best way to help a boy criminal is to trust him, was given last week when Max Anderson, a boy burglar, went to the Industrial school at Golden alone and unwatched simply because the juvenile judge told Anderson that he wanted to make a man of him, and began by trusting him.

Yesterday the judge received a note from the warden of the reform school, saying that Anderson had reported as directed and was now serving out his term.

"Honor in a criminal," exclaimed the doubters. "We have heard of honor among thieves, but your Honor is not a thief." One man said the judge was foolish to trust Anderson. Another hinted that he was temporarily insane, while the police, who brought Anderson from Wisconsin, where he had fled after robbing the Vallejo hotel in Denver, bluntly said that the judge would never see the boy again.

Anderson is only 16 years old, and Judge Lindsey says that he is one of the worst cases of a boy criminal that he ever saw. He was a bell boy at the Vallejo and after robbing it went to Colorado Springs and burglarized a hotel there. The police caught him after a long chase in Wisconsin and wanted to send him to the penitentiary, but the judge refused to sentence him.

Judge Lindsey last week gave him a railroad ticket to Golden and the money which the police had taken from him when they caught him. He told Anderson that he would be unwatched and could escape if he wanted to do so. He said that he wanted to make a man of Anderson, however, and trusted him. Anderson is the third boy in the past few days whom Judge Lindsey has trusted and not one has failed to appear at the reformatory. The judge has made a practice of sending all culprits to the reform school in this manner.

BOOK REVIEWS.

PROBATE REPORTS, ANNOTATED, VOL. 9.

A work of more than ordinary interest to the profession is that entitled "Probate Reports, Annotated," volume 9 of which has just issued from the press. These reports contain, in full, the cases of general interest and value decided in the highest courts of the several states, on points of probate law since volume 8 was issued. How well the editor of these reports, Hon. Wm. L. Clarke, has done his duty is evidenced by the exhaustives of the notes appended to the cases, and, indeed, the care used in selecting the cases, and the value of the cases, will be appreciated on examining, among others, the cases on the following pages: Page 45, power of probate court to revoke decree of distribution; page 59, effect of the murder of ancestor by heir or of spouse by surviving spouse; page 90, contract to leave property by will; page 212, revocation of will by cancellation, etc.; page 261, construction of "dying without issue" in a will; page 306, right of an administrator to redeem from a mortgagee; page 335, vested or contingent legacies; page 406, devise and descent of burial lots; page 409; incorporation of papers in will by reference—Benett Will Case in which the Hon. Wm. J. Bryan was interested; page 415, revocation of will by birth of child; page 425, provision in will against contest; page 446, right of control over burial of the dead; page 453, estoppel by receipt of legacy or devise; page 561, active and passive trusts; pages 627 and 634, whether wills conditional upon a journey, etc.

Special pains have been taken by the editor, Mr. Clarke, in preparing the notes in Vol. 9, Probate Reports Annotated. They are much longer and more exhaustive than in previous volumes, and great care has been taken to insure their accuracy. Special attention is called to the following very full monographic notes in this volume: Forty-two pages on the rights of children omitted from a will; seven pages on the power of probate courts to open, correct, vacate or modify their orders, judgments or decrees; ten pages on annuities; three pages on post-nuptial agreements between husband and wife releasing the wife's dower or other interest in the husband's estate; two pages on attorney's fees for procuring letters of administration; one page on who may sue on claims due estate; five pages on the title of heirs, etc., and right of action in relation to real estate; fifteen pages on the adoption of children in relation to probate law; two pages on revocation of wills by marriage or birth of child; three pages on conditions in will against contest or presentation of claims against estate; three pages on estoppel to contest or claim against will by acceptance of legacy or devise; four pages on supplying omissions in construing wills; two pages on release by heir of interest in estate of ancestor.

Printed in one volume of 706 pages, and published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

The Latest and Best Students' Book on the Subject. The Law of Real Property. By Frank Goodwin, Emeritus Professor of the Law of Real Property in the Boston University Law School. Octavo. Law Sheep. Price, $4.00. Review will follow.

A Students' Edition of the Law of Bailments, Including Pledge, Innkeepers and Carriers. By James Schouler, Author of "Schouler on Domestic Relations," etc. Sheep. Price, $3.50. Review will follow.

A Students' Edition of Law of the Domestic Relations. By James Schouler, Auther of "Law of Bailments," etc. Sheep. Price, $3.50. Review will follow.

New (Second) Edition of Studies in the Civil Law, and its Relation to the Jurisprudence of England and America. By William Wirt Howe, former Justice of the Supreme Court of Louisiana. Second Edition. Sheep. Price, $3.50. Review will follow.

HUMOR OF THE LAW.

"He never had but one genuine case in his life," said a lawyer of his rival, "and that was when he prosecuted his studies."

Lawyer (to office boy). Samuel, did I see you reading a law book this morning?

Office boy (proudly). Yes, sir.

Lawyer. Well, Samuel, that gives you the status of a law clerk. Your salary will be discontinued Saturday.

A very good story is told of Judge Sherman, before whom was tried the Tucker case at East Cambridge. He was walking through the Boston streets recently, returning a shabby umbrella to its owner, looking for all the world like a countryman, when a bunco steerer stepped up to him and claimed acquaintance.

"I don't seem to remember you," said the judge.

Upon being urged to refresh his memory, the judge, seeing through the little game, calmly said: "Well, my friend, I have sent so many of you boys to jail I can't remember you all, you know."

A judge in one of the New York municipal courts has his own quick way of getting into the heart of a case. The following is told as a true story:

The lawyer for the plaintiff had just finished presenting his argument, and, as he mopped his brow and sat down, the judge stared at him admiringly with wide open eyes and mouth. Then he turned to the other lawyer, who had risen to his feet.

"Defendant needn't plead, plaintiff wins," he shouted.

"But, your Honor," protested the lawyer, "let me at least present my case."

The judge looked weary. "Well, go ahead," he grunted.

So the lawyer for the defendant went ahead. When he had finished, the judge looked at him, too, with wide open eyes and mouth.

"Don't it beat the Dutch!" he exclaimed. "Defendant wins."

WHAT THE WAR DID FOR THE IRISHMAN.

A few years ago a lawyer and his party was looking over the iron properties of the old Cumberland Iron Works, near Dover, Tennessee, with a view of purchasing it. Before the War of the Rebellion the works had been systematically managed and an Irishman, who had been employed before the war and who knew the property, was showing the lawyer and his party the places where the iron ore showed to the best advantage. When they arrived at the test pit, which this son of Erin had himself made, many years previous, he broke forth: "Now, before the war, it

was not one av thim dom nagers they sint to dig th' tist pit. It was th' Irishman they sint. If it kaved in on the Irishman, it was but a dollar and a quather a day, but if it was a dom nager that was sint, an' it kaved in on him, it was two thousand dollars out of pocket. So it was the Irishman that digged th' pits. Faith and oi wint to the war and fot foive yeers for Jiff Davis, and whin the war was over, an Irishman was worroth just as mooch as a dom nager."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Term of Policy.—An accident insurance policy takes effect from its date, unless stated to take effect upon condition.—Rayburn v. Pennsylvania Casualty Co., N. Car., 50 S. E. Rep. 762.

2. ACCORD AND SATISFACTION—Retention of Check.—Where a check was sent to a creditor, with instructions to return it unless he would accept it in full satisfaction, it was a question for the jury whether the creditor retained the check for an unreasonable time before returning it.—Fredonia Gas Co. v. Elwood Supply Co., Kan., 80 Pac. Rep. 969.

3. ACCOUNT—Remedy at Law.—Equity will not take jurisdiction of an accounting, where there is no relation of trust and the accounting is not complicated, and is merely a basis for ascertaining damages.—Holland v. Hallahan, Pa., 60 Atl. Rep. 735.

4. ACTION—Mistaken Theory.—That a party proceeds to trial on a mistaken idea as to the nature of the action does not deprive him of the right to such relief as is consistent with the real issues and the evidence.—Logan v. Freerks, N. Dak., 103 N. W. Rep. 426.

5. ADMIRALTY—Evidence.—Where the trial judge, on a libel for injury to cargo, saw none of the witnesses, and there was a sharp conflict in the evidence, the entire record would be reviewed on appeal.—Lazarus, v. Barber, U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 534.

6. ADVERSE POSSESSION.—Forfeited Lands.—To enable one to take the benefit of a transfer of a forfeited title to land under Const., art. 13, § 3, it is sufficient if he is in such condition at any time while title remains in the state.—State v. Harman, W. Va., 50 S. E. Rep. 828.

7. ADVERSE POSSESSION—Void Tax Deed as Color of Title.—A void tax deed is good color of title, both for the purpose of quieting title to forfeited lands from the state, under Const., art. 13, § 3, and the statute of limitations.—State v. Harman, W. Va., 50 S. E. Rep, 828.

8. ANIMALS—Stock Law.—Where supervisors improperly ordered a stock law in force in a part of the county on a petition that it be put in force in the entire county, the petition was still pending, and no appeal lay from the order.—Bowles v. Townes, Miss., 38 So. Rep. 354.

9. APPEAL AND ERROR—Effect of Former Dismissal.—An appeal from a judgment roll held not subject to dismissal because former appeal in same action was dismissed for want of prosecution.—Collins v. Consol. Gold Min. & Mill. Co., S Dak., 103 N. W. Rep. 885.

10. APPEAL AND ERROR—Harmless Error.—Refusal to permit a witness to answer a question is harmless, where the witness is afterwards permitted to testify to practically the same matter without objection.—Hofacre v. City of Monticello, Iowa, 103 N. W. Rep. 488.

11. APPEAL AND ERROR—Irregularity in Transfer of Case.—A party complaining of irregularity in transfer of a case from one department to another of a district court held required to show prejudice from the transfer.—Finlen v. Heinze, Mont., 80 Pac. Rep. 918.

12. APPEAL AND ERROR—Review of Order Overruling Demurrer.—Defendant held to have right to review an order overruling his demurrer to plaintiff's reply on a transcript without bringing up the evidence.—Talbott v. Donaldson, Kan., 80 Pac. Rep. 981.

13. ARREST—Validity.—An illegal use of a *capias* did not invalidate the writ, though plaintiff may be responsible for the improper use.—Powell v. Perkins, Pa., 60 Atl. Rep. 731.

14. ATTORNEY AND CLIENT—Unauthorized Extension of Payment.—Where an attorney is employed to collect claims, he has no authority to extend the time of payment of claims in his hands for collection.—Mason v. Edward Thompson Co., Minn., 103 N. W. Rep. 507.

15. BAIL—Validity of Recognizance.—A recognizance in a criminal case is not vitiated by requiring the defendant, in concluding words, to "further do and receive that which the court shall consider."—State v. Russ, Me., 60 Atl. Rep. 704.

16. BANKRUPTCY—Advancement as a Fraudulent Conveyance.—In a suit by a trustee in bankruptcy to set aside as fraudulent a conveyance to the infant child of the bankrupt, the burden held to be on defendant to show the *bona fides* of the transaction.—Wick v. Hickey, Iowa, 103 N. W. Rep. 469.

17. BANKRUPTCY—Attachment.—Where possibly all of the property attached is exempt from bankruptcy proceedings, it may be held under an attachment until it has been determined in the bankruptcy proceedings what part, if any, has passed to the trustee.—Jewett Bros. v. Huffman, N. Dak., 103 N. W. Rep. 409.

18. BANKRUPTCY—Conditional Sales.—Property which was delivered to a purchaser for the purpose of sale by him in the usual course of his business passes to his trustee in bankruptcy, notwithstanding a contract by which the seller reserved title until payment should be made, with the right to take possession at any time.—*In re* Rasmussen's Estate, U. S. D. C., D. Oreg., 136 Fed. Rep. 704.

19. BANKRUPTCY—Interest in an Estate.—Bankrupt's trustee held authorized to sell all the right, title, and interest of the bankrupt in the estate of his father, where a purchaser who would give a substantial sum had been

found, and it did not clearly appear that the bankrupt had no right in his father's estate which passed to his trustee.—*In re* Gutterson, U. S. D. C., D. Mass., 136 Fed. Rep. 698.

20. BANKRUPTCY—Knowledge of Creditor.—Where a discharged bankrupt seeks to enjoin the collection of a judgment, he must plead and prove that the creditor had notice or knowledge of proceedings in time for allowance of the same.—Armstrong v. Sweeney, Neb., 103 N. W. Rep. 436.

21. BANKRUPTCY—Preferences.—Taking possession of mortgaged property under an unrecorded chattel mortgage held not a preference, voidable by the mortgagor's trustee in bankruptcy.—Humphrey v. Tatman, U. S. S. C., 25 Sup. Ct. Rep. 567.

22. BANKRUPTCY — Sale of Property Discharged of Liens.—To authorize an order for the sale of a bankrupt's property free of liens, the record should show affirmatively that every creditor whose lien will be discharged has received notice of the application therefor, and a general statement by the referee that such notice has been given is sufficient.—*In re* Saxton Furnace Co., U. S. D. C., E. D. Pa., 136 Fed. Rep. 697.

23. BAIL—Sufficiency.—A recognizance for the appearance of defendant on an adjournment of examination before a justice on a charge of felony held not void.—Leis v. State, Kan , 80 Pac. Rep. 949.

24. BANKS AND BANKING — Voluntary Liquidation.—Where a national bank went into voluntary liquidation, under Rev. Stat. U. S., § 5220 (U. S. Com. St. 1901, p. 3503), it was not thereafter required to register a subsequent transfer of its stock, nor issue new stock to the transferee.—Muir v. Citizens' Nat. Bank, Wash., 80 Pac. Rep. 1007.

25. BILLS AND NOTES—Consideration.—Where a note is given partly without consideration, and the amount that is based on a sufficient consideration is paid, no recovery can be had for the balance.—Littlefield v. Perkins, Me., 60 Atl. Rep. 707.

26. BILLS AND NOTES—Delivery of Check to Impostor.—Drawer of check delivered to an impostor must bear the loss as against drawee or *bona fide* holder.—Land Title & Trust Co. v. Northwestern Nat. Bank, Pa., 60 Atl. Rep. 723.

27. BOUNDARIES—Absence of Monument —Where, in fixing boundaries from title deeds, a monument called for is not found, and the place where such monument stood cannot be ascertained, the course and distance called for must govern.—Mays v. Hinchman, W. Va., 50 S. E. Rep. 823.

28. BOUNDARIES — How Determined. — Ordinarily a boundary line marked part of the way will be continued in the same direction for the full distance.—Seitz v. People's Sav. Bank, Mich., 103 N. W. Rep. 545.

29. BROKERS—Duration of Agency to Sell Land.—A real estate broker held required to make a sale of his principal's land within 60 days in order to earn his commissions.—Beadle v. Sage Land & Improvement Co., Mich., 103 N. W. Rep. 554.

30. BROKERS—Margins.—Where brokers agreed that their customer's liability should be limited to the amount of margins deposited, they were not entitled to recover losses in addition to such margins.—Zell v. Corkran, Del , 60 Atl. Rep. 699.

31. CARRIERS—Failure to Stop at Designated Station.—Railroad ticket held to indicate an undertaking to carry the purchaser to L on a train which, according to the time-cards, stops at L.—Usher v. Chicago, R. I. & P. Ry. Co., Kan., 80 Pac. Rep. 956.

32. CARRIERS — Rebilling Rates.—In the absence of record proof showing any official action by the railroad commission, held, that the putting in force of a rebilling rate was a voluntary act of complainant railroad.—Alabama & V. Ry. Co. v. Railroad Commission of Mississippi, Miss., 38 So. Rep. 356.

33. CARRIERS—Slippery Condition of Station Platform.—It is the duty of a railroad company to exercise all ordinary care to maintain its platform in such a reasonably safe condition that passengers in due care can walk over it safely.—Maxfield v. Maine Cent. R. Co., Me., 60 Atl. Rep. 710.

34. CARRIERS—Time for Filing Claim for Injury to Shipment.—Where a contract for the shipment of a horse provided for a claim in writing to be filed within five days from removal of live stock from the car, it is a condition precedent to the right of plaintiff to recover.—Baltimore & O. R. Co. v. Hubbard, Ohio, 74 N. E. Rep. 214.

35. CARRIERS—Unjust Discrimination in Rates.—Where a railroad voluntarily establishes as to certain shippers a rate so low as to be unremunerative, it must nevertheless be granted to all alike.—Alabama & V. Ry. Co. v. Railroad Commission of Mississippi, Miss., 38 So. Rep. 356.

36. CONTRACTS—Construction.—A contract between a manufacturer and dealer in lamps construed, and held, that the manufacturer did not have the right to elect to take lamps in payment of an indebtedness —Union Blast Co. v. Michigan Electric Co., Mich., 103 N. W. Rep. 556.

37. CONTRACTS — Signature Obtained by Fraud. — A signature to a paper obtained by fraudulent representations is not binding on the signer, when he cannot read.—Mason v. Postal Telegraph Cable Co., S. Car., 50 S. E. Rep. 781.

38. COPYRIGHT— Sufficiency of Notice. — A notice of copyright on a picture, reading: "Copyright 1902, Published by Hills & Co., Ltd., London, England"—is sufficient.—Hills & Co. v. Hoover, U. S. C. C., E. D. Pa., 136 Fed. Rep. 701.

39. CORPORATIONS—Service of Process on Foreign Corporation.—Service of summons on a director of a foreign corporation casually within the state held to confer no jurisdiction on the federal court, where the corporation is doing no business and has no property in the state.—Remington v. Central Pac. R. Co., U. S. S. C., 25 Sup. Ct. Rep. 577.

40. CORPORATIONS—Suit by Stockholder.—A demand on the directors of a corporation, as required by equity rule 93, need not be made to entitle a stockholder to maintain a suit for relief, where the bill alleges that the directors own a majority of the stock and are diverting the income of the corporation to themselves.—Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., U. S. C. C., E. D. Pa., 136 Fed. Rep. 710.

41. COURTS—Joint and Several Liability.—Joint tortfeasors are jointly and severally liable.—Bailey v. Delta Electric Light, Power & Mfg. Co., Miss., 38 So. Rep. 354.

42. COURTS—State Board of Equalization.—A ruling of the Supreme Court of North Dakota that its state board of equalization was entitled to levy taxes by percentages would be followed by the federal courts with reference to real estate assessments for taxes in that state.—Paine v. Germantown Trust Co., U. S. C. C. of App., 136 Fed. Rep. 527.

43. COVENANTS—Expense of Defending Title.—A vendor of land held not liable to purchaser for expense incurred in defending against an unsuccessful attempt to enforce liability on a covenant of warranty by purchaser's grantee.—Seitz v. People's Sav. Bank, Mich., 103 N. W. Rep. 545.

44. CRIMINAL LAW—Sufficiency of Evidence in Murder Case.—Two or more witnesses, each testifying to different parts of same transaction, tending directly to show guilt of accused, held to comply with Revision 1902, § 1508, requiring two witnesses to convict for crime punishable with death.—State v. Marx, Conn., 60 Atl. Rep. 699.

45. CRIMINAL TRIAL—Instructions.—In a criminal prosecution, the court is not required to select a single fact from the mass of testimony and charge the jury that the proof as to that fact must exclude every reasonable hypothesis except defendant's guilt.—State v. Adams, N. Car., 50 S. E. Rep. 765.

46. CRIMINAL TRIAL — Removal to Another Federa District.—Where it is sought to remove a defendant from

one federal district to another for trial on an indictment the question of the validity of such indictment in matters of substance may properly be raised and determined in the district of the arrest in *habeas corpus* proceedings.—United States v. Green, U. S. D. C., N. D. N. Y., 136 Fed. Rep. 618.

47. CRIMINAL TRIAL—Right to Speedy Trial.—Constitutional rights of accused to a speedy trial held not violated by the prosecution of proceedings to remove the accused to another federal district for trial of an indictment.—Beavers v. Haubert, U. S. S. C., 25 Sup. Ct. Rep. 573.

48. CRIMINAL TRIAL—Unlawful Sale of Liquor.—Liquor seized without a warrant held admissible on a prosecution for unlawful sale.—State v. Schmidt, Kan., 80 Pac. Rep. 948.

49. DAMAGES—Instructions.—In an action for injuries, an instruction that if the jury finds a permanent impairment and "destruction" of plaintiff's nervous system, etc., held not erroneous.—Fishburn v. Burlington & N. W. Ry. Co., Iowa, 103 N. W. Rep. 481.

50. DEEDS—Delivery.—Where the agent of a vendor receives a deed to deliver on payment of the consideration, and places the deed on record after notice by the vendor that the contract has been rescinded for nonperformance, no legal delivery has been made.—Mason v. Strickland, Neb., 103 N. W. Rep. 458.

51. DIVORCE—Alimony.—Where a petition is filed for divorce or alimony alone, the court may make an order as to expenses which will insure the wife an efficient preparation of her case.—Day v. Day, Kan., 80 Pac. Rep. 974.

52. DIVORCE—Failure to Issue Execution for Alimony.—A decree for alimony does not become dormant for failure to issue execution thereon for more than five years.—Lemert v. Lemert, Ohio, 74 N. E. Rep. 194.

53. EMBEZZLEMENT—Private Banker's Misuse of Funds.—An instruction that if defendant, a private banker, failed to repay a deposit on demand, with a dishonest, corrupt, and fraudulent intent, he was guilty of embezzlement, though the depositor consented to his using the money, held error.—State v. Dunn, N. Car., 50 S. E. Rep. 772.

54. EMINENT DOMAIN—Surface Water.—Where surface water is thrown back on premises by the construction of a railroad embankment, the resulting damages are included in the compensation received in condemnation proceedings.—Johnson v. Charleston & W. C. Ry., S. Car., 50 S. E. Rep. 775.

55. EMINENT DOMAIN—Telegraph Company's Locating Line.—Permit granting telegraph company a right to locate its line where it chooses may be varied by parol, when fraud is alleged.—Mason v. Postal Telegraph Cable Co., S. Car., 50 S. E. Rep. 781.

56. EQUITY—Diverse Citizenship.—A bill in equity in a federal court held required to allege citizenship of the parties only where jurisdiction depends on diverse citizenship.—Wright v. Skinner, U. S. D. C., S. D. N. Y., 136 Fed. Rep. 694.

57. EVIDENCE—Conclusions of Witness.—A witness may testify that snow looked as if some one had fallen therein and left the impress of his body there.—Rothrock v. City of Cedar Rapids, Iowa, 103 N. W. Rep. 475.

58. EVIDENCE—Identification of Letter.—Typewritten letter may have about it such peculiarities as shall enable one who has received several such letters to identify it.—Huber Mfg. Co. v. Claudel, Kan., 80 Pac. Rep. 960.

59. EVIDENCE—Market Papers to Establish Value.—In an action for breach of an option for the sale of hides in Detroit, a trade paper containing the market value of hides in Chicago held admissible.—Kibler v. Caplis, Mich., 103 N. W. Rep. 531.

60. EVIDENCE—Meteorological Records.—Weather records, kept voluntarily and not verified by the person making them, held not admissible to show weather conditions.—Monarch Mfg. Co. v. Omaha C. B. & S. Ry. Co., Iowa, 103 N. W. Rep. 493.

61. EVIDENCE—Suicide.—In case of death under circumstances not explained, the legal presumption is that such death was not by suicide.—Clemens v. Royal Neighbors of America, N. Dak., 103 N. W. Rep. 462.

62. EXECUTION—Trover and Conversion.—The owner of goods unlawfully converted and sold on execution is entitled to interest on the value of the goods from the date of the sale.—Johnson v. Gillen, Mich., 103 N. W. Rep. 547.

63. EXECUTORS AND ADMINISTRATORS—Debts Due from Heir.—On distribution of a decedent's estate, a sum of money which had been furnished by decedent to a son should, whether regarded as a debt or an advancement, be deducted from the son's share.—Wick v. Hickey, Iowa, 103 N. W. Rep. 469.

64. EXTRADITION—Validity of Commitment.—Evidence of malice or an ulterior purpose on the part of the prosecuting witness at whose instance a criminal prosecution was instituted in a foreign country will not invalidate a commitment of the accused for extradition from this country.—*In re* Herskovitz, U. S. D. C., N. D. Ohio, 136 Fed. Rep. 713.

65. FEDERAL COURTS—Diverse Citizenship.—The question of the jurisdiction of a federal circuit court, based on diversity of citizenship, may be raised by a motion to dismiss on proofs taken by the master.—Steigleder v. McQuesten, U. S. S. C., 25 Sup. Ct. Rep. 616.

66. FEDERAL COURTS—Federal and Non-Federal Question.—The Supreme Court of the United States will not take jurisdiction of a writ of error to a state court, where judgment rests on two grounds, one of which does not involve a federal question.—Allen v. Arguimbau, U. S. S. C., 25 Sup. Ct. Rep. 622.

67. FIRE INSURANCE—Action by Mortgagor.—Resident mortgagor may sue in the state on foreign insurance policy, though mortgagee, having an interest and party defendant in the action, is also a nonresident.—Lewis v. Guardian Fire & Life Assur. Co., Limited, of London, England, N. Y., 74 N. E. Rep. 224.

68. FIRE INSURANCE—Right of Action.—On a fire insurance policy in the name of the owner of the property, containing the clause, "payable to [a building association] as its interest may appear," the owner may sue.—Staats v. Georgia Home Ins. Co., W. Va., 50 S. E. Rep. 815.

69. FRAUDS, STATUTE OF—Boundaries.—Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately and accompanied by possession according thereto.—Mays v. Hinchman, W. Va., 50 S. E. Rep. 823.

70. FRAUDS, STATUTE OF—Parol Promise Affecting Mortgaged Land.—Promise of purchaser at mortgage sale to sell the property and deduct only the mortgage debt held not enforceable after five years from date, under act April 22, 1856.—Mollorio v. Freeman, Pa., 60 Atl. Rep. 735.

71. FRAUDS, STATUTE OF—Recovery Quantum Meruit.—A party not at fault may recover in *quantum meruit* for advancements made under a contract unenforceable under the statute of frauds.—Brashear v. Rabenstein, Kan., 80 Pac. Rep. 950.

72. GAMING—Pool Room a Gaming House.—A pool room at which persons congregate to bet on horse races is a gaming house, and punishable as a nuisance at common law and under B. & C. Com. § 1930.—State v. Nease, Oreg., 80 Pac. Rep. 897.

73. GARNISHMENT—Liability of Garnishee.—Under a contract for the installation of a heating and plumbing system, held, that there was, prior to the completion of the work, nothing due the contractor which could be reached by garnishment.—Simmons Hardware Co. v. Baker, Mich., 103 N. W. Rep. 529.

74. GARNISHMENT—Trustee Process.—Where defendant assigned wages to be earned for money, and the assignee accepted an order of defendant, he had an equitable claim to reimbursement when the wages were attached by trustee process.—Mace v. Richardson, Me. 60 Atl. Rep. 701.

75. GAS—Right to Bury Pipe Line in Public Highway.—As against the state, a natural gas company may bury its pipe line in the public highway.—State v. Kansas Natural Gas, Oil, Pipe Line & Improvement Co., Kan., 80 Pac. Rep. 962.

76. GIFTS—Undue Influence.—Equity will set aside a bequest to a child by a parent, where the child stands in a fiduciary relation to such parent.—*In re* Sperl's Estate, Minn., 103 N. W. Rep. 502.

77. GUARDIAN AND WARD—Action on Guardian's Bond.—Failure of a guardian to discharge his trust and neglect to return an inventory held breaches of his bond, giving a right of action.—Miller v. Kelsey, Me., 60 Atl. Rep. 717.

78. HOMESTEAD—Parol Conveyance by Husband and Wife.—Where husband and wife entered into an oral contract for the sale of their homestead, and the purchaser took possession and paid the price and made valuable improvements, held, that he was entitled to a decree requiring a conveyance.—Grice v. Woodworth, Idaho, 80 Pac. Rep. 912.

79. HOMICIDE—Capital Punishment.—On prosecution for murder, admission by counsel for accused in argument held not to take the place of testimony.—State v. Marx, Conn., 60 Atl. Rep. 690.

80. HOMICIDE—Necessity of Retreating.—In case of an ordinary assault, the person assailed must retreat as far as consistent with his own safety before killing his assailant.—State v. Blevins, N. Car. 50 S. E. Rep. 763.

81. HUSBAND AND WIFE—Future Loss of Wife's Services.—In an action by a husband for injuries to the wife, the husband is not entitled to recover for any loss of the services of his wife which may occur in the future because of the injuries inflicted by the defendant.—Birmingham Southern Ry. Co. v. Lintner, Ala., 38 So. Rep. 363.

82. HUSBAND AND WIFE—Homestead Entry.—A wife's interest in land on which her husband makes a homestead entry, but for which he does not receive a patent until after her death, held to descend to her children.—Cox v. Tompkinson, Wash., 80 Pac. Rep. 1005.

83. HUSBAND AND WIFE—Life Insurance Policy.—To constitute a valid gift *inter vivos* of the insurance policy from the wife to her husband, the necessary change of beneficiary must be made during her lifetime.—Littlefield v. Perkins, Me., 60 Atl. Rep. 707.

84. INFANTS—Indivisibility of Motion for New Trial.—The rule that a motion for a new trial is indivisible cannot be invoked to defeat review of appeal by a minor defendant, whose guardian has inadvertently joined her with a nominal defendant.—Godfrey v. Smith, Neb., 103 N. W. Rep. 45.

85. INTOXICATING LIQUORS—Action to Abate Liquor Nuisance.—In an action to enjoin a liquor nuisance, it is not necessary to have the fact established that the place charged as maintained is a nuisance by any former adjudication.—Cowdry v. State, Kan., 80 Pac. Rep. 953.

86. JUDGMENT—Plea of Res Judicata.—It is sufficient to support a plea of *res judicata* if the record of the court having cognizance of the prior case shows final disposition of it on its merits, though the issues did not appear in the entry of judgment —Holford v. James, U. S. C. C. of App., Eighth Circuit, 136 Fed. Rep 553.

87. JUDGMENT—Record of Foreign Court in Garnishment Proceedings.—Record of foreign court of limited jurisdiction in garnishee proceedings must show that the foreign corporation had submitted itself to such jurisdiction.—Erwin v. Southern Ry., S. Car., 50 S. E. Rep. 778.

88. JUDGMENT—Res Judicata.—An adjudication that a will had been procured by undue influence of the principal legatee held not *res judicata* on an issue as to the validity of a gift *causa mortis* to the legatee.—Reed v. Whipple, Mich., 103 N. W. Rep. 548.

89. JUDGMENT — Revival. — That the transcript of a judgment rendered in a county court was filed with the clerk of the district court after it had become dormant did not prevent the district court from acquiring jurisdiction of proceedings to revive it.—Bussing v. Taggart, Neb., 103 N. W. Rep. 430.

90. JUSTICES OF THE PEACE—Judicial Acts.—Judicial acts of duly elected justice of the peace cannot be collaterally attacked, because he has accepted the office of city attorney.—State v. Miller, Kan., 80 Pac. Rep. 947.

91. JUSTICES OF THE PEACE—Jurisdiction.—Where an original notice issued by a justice purported to have been served in the township where the judgment was rendered, it would be presumed that defendants' residence conferred jurisdiction.—Herald Printing Co. v. Walsh, Iowa, 103 N. W. Rep. 473.

92. LANDLORD AND TENANT—Non-Payment of Rent.—Where a landlord delivered a notice to quit or pay rent to an agent for service on his tenant, the tenant was authorized to treat such agent as having authority to receive the rent.—Cockerline v. Dwyer, Mich., 103 N. W. Rep. 522.

93. LIFE INSURANCE—Evidence as to Suicide.—Where the circumstances surrounding the death of a person all point to death by suicide, a directed verdict of suicide will be sustained.—Clemens v. Royal Neighbors of America, N. Dak., 103 N. W. Rep. 402.

94. LIMITATION OF ACTION—Non-Payment of Mortgage.—Where default had commenced to run for nonpayment of mortgage note and taxes, a purchaser from the mortgagor did not waive the right to plead limitations by subsequently paying the taxes.—Snyder v. Miller, Kan., 80 Pac. Rep. 970.

95. MANDAMUS — Violation of Injunction. — Supreme court will not by *mandamus* require a magistrate to violate an injunction.—State v. Snelling, Kan., 80 Pac. Rep. 966.

96. MARRIAGE - Common Law Marriage.—Where there has been no living together, and no admissions of the parties, or other evidence, except the unsupported oath of one of the parties after the other is deceased, there is a presumption against the existence of contract of marriage.—Sorensen v. Sorensen, Neb., 103 N. W. Rep. 455.

97. MASTER AND SERVANT—Assumed Risk.—That an employee used an unsafe method of doing work in concurrence with the other employees does not relieve him from the risk incurred.—Leard v. International Paper Co., Me., 60 Atl. Rep. 700.

98. MASTER AND SERVANT—Contributory Negligence.—In an action for injuries to a servant, the standard of conduct for determining the liability of defendant and the contributory negligence of plaintiff is that of the ideal prudent man.—Marks v. Harriet Cotton Mills, N. Car., 50 S. E. Rep 769.

99. MASTER AND SERVANT — Dangerous Premises. — Neglect of the person to whom is delegated by the master the duty of providing a reasonably safe place for an employee to work is negligence of the master.—Schiglizzo v. Dunn, Pa., 60 Atl. Rep. 724.

100. MASTER AND SERVANT—Injury to Servant by Falling Brick —In an action by an employee, struck by a falling brick in a building in the course of erection, where there was no evidence as to how the brick came to fall, nor where it started, a nonsuit was properly entered.—Laven v. Moore, Pa., 60 Atl. Rep. 725.

101. MASTER AND SERVANT — Safe Place to Work. — Where there is a safe method for the performance of work, and a dangerous one, and the servant selects the latter with full knowledge, he cannot recover for consequential injuries.—Covington v. Smith Furniture Co., N. Car., 50 S. E. Rep. 761.

102. MASTER AND SERVANT—Use of Dynamite.—The use of dynamite in slate quarrying is not negligence, and proportionate care is required of both master and servant in its use.—Erickson v. Monson Consol. Slate Co., Me., 60 Atl. Rep. 708.

103. MASTER AND SERVANT—Wrongful Discharge.—In an action for a servant's wrongful discharge, a pay roll made up by him held admissible in rebuttal of evidence that he did nothing in the line of his employment.—Sun

Printing & Publishing Ass'n v. Edwards, U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 591.

104. MONEY RECEIVED—Defenses.—In an action to recover from attorneys moneys had and received, held, that the burden was on defendants to establish defense that they retained it for legal services. — Logan v. Freerks, N. Dak., 103 N. W. Rep. 426.

105. MORTGAGES—Defective Title.—A mortgagee held charged with notice of facts which inquiry would have disclosed, showing that the mortgagors in fact had no title to the property.—Dennis v. Atlanta Nat. Building & Loan Assn., U. S. C. C. of App., Fifth Circuit, 136 Fed. Rep. 589.

106. MORTGAGES — Notice Restoring Possession. — Where a writ of assistance to the purchaser at foreclosure issues without notice, and the party in possession is dispossessed, the court on his motion should restore possession.—Ray v. Trice, Fla., 38 So. Rep. 367.

107. MORTGAGES—Right to Surplus from Sale. — The right of a mortgagor on foreclosure to receive the surplus is not affected by the decree providing that such surplus shall be subjected to the further order of the court.—Easton v. Woodbury, S. Car., 50 S. E. Rep. 790.

108. MORTGAGES—Stipulation Against Assignment.—A provision in a mortgage that it shall be nonnegotiable and uncollectible in the hands of any other than the original mortgagee is not operative against an assignment effected by law or order of court —Scaife v. Scammon Inv. & Sav. Ass., Kan., 80 Pac. Rep. 957.

109. MUNICIPAL CORPORATIONS—Damages for Overflow of Surface Waters —Lot owner held entitled to recover damages caused by negligent obstruction of gutters and catch-basins, causing surface water to overflow, although he had not brought his entire lot to grade.—Monarch Mfg. Co. v. Omaha, C. B. & S. Ry. Co., Iowa, 103 N. W. Rep. 493.

110. MUNICIPAL CORPORATIONS—Icy Sidewalk.—A city held liable for injury to a pedestrian from ice on a sidewalk, of which its officers had no actual knowledge; the conditions having existed so as to charge it with notice. —City of Muncie v. Hey, Ind., 74 N. E. Rep. 250.

111. MUNICIPAL CORPORATIONS —Liability on Warrants. —Money derived by a city from special assessments is a trust fund, and the city is liable to any warrant holder whose rights have been infringed by misapplication of the fund.—Red River Valley Nat. Bank v. City of Fargo, N. Dak., 103 N. W. Rep. 390.

112. MUNICIPAL CORPORATIONS—Negligence of Contractor.—A city is not liable for personal injuries caused by the negligence of a contractor employed by the county to construct a walk.—Wright v. City of Muskegon, Mich., 103 N. W. Rep. 558.

113. NEGLIGENCE—Assumed Risk.—One is not guilty of negligence by an act or omission which would not lead an ordinarily prudent man to apprehend danger from it.—Cowett v. American Woolen Co., Me., 60 Atl. Rep. 703.

114. NEGLIGENCE—Degree of Care Required of Child.—A child six years of age held only chargeable with such a degree of care as children of his age could reasonably be expected to exercise under similar circumstances.—Fishburn v. Burlington & N. W. Ry. Co., Iowa, 103 N. W. Rep. 481.

115. NEGLIGENCE—Inadequate Damages.—Where, in an action for death of plaintiff's intestate by negligence, the jury rendered a verdict for plaintiff of $1, a new trial for inadequacy of damages was properly granted.—Rawitzer v. St. Paul City Ry. Co., Minn., 103 N W. Rep. 499.

116. PARTNERSHIP — Fraudulent Agreement of One Partner with Creditors.—Delay of five years in asserting rights against partner and creditors of firm, who formed a corporation with firm property as capital, held not to bar enforcement of nonparticipating partner's equitable rights.—Lamb v. Lamb, Mich., 103 N. W. Rep. 533.

117. PARTNERSHIP—Purchase by Partner.—In an action against a firm for goods sold to it, evidence showing the holding out of the partner buying the goods as authorized to buy for the firm held admissible under the pleadings.—Beckwith v. Mace, Mich., 103 N. W. Rep. 559.

118. PAUPERS—Residence and Taxing.—The assessment of a tax against a person is no admission on his part as to his residence, unless coupled with its payment or his recognition of it as an existing liability.—City of Rockland v. Inhabitants of Union, Me., 60 Atl. Rep. 705.

119. PAYMENT—Mistake.—To authorize a recovery of money paid under mistake, it must appear that plaintiff has not received the equivalent contemplated by the payment.—Dickey County v. Hicks, N. Dak., 103 N. W. Rep. 423.

120. PHYSICIANS AND SURGEONS—Malpractice.—In an action for malpractice, held, that the defense of negligence on the part of the patient will not defeat the action, where the negligence conduced merely to aggravate an injury primarily sustained through defendant's negligence.—Beadle v. Paine, Oreg., 80 Pac. Rep. 908.

121. PLEDGES—Definiteness of Debt.—There may be a valid pledge, though there exists no such definiteness as to the debt as is required in the case of mortgages.—Marsh v. Keating, Conn , 60 Atl. Rep. 689.

122. PROPERTY—Actual and Constructive Possession. —Where one in actual possession of land conveys legal title to that portion on which is the actual possession, his constructive actual possession of the residue ceases. —State v. Harman, W. Va., 50 S. E. Rep. 828.

123. QUIETING TITLE—Indefiniteness of Answer.—Defendant in an action to quiet title held not to fail in his defense because describing his right as under a reservation, while the deed set out shows it to be an exception. —Elsea v. Adkins, Ind., 74 N. E. Rep. 242.

124. RAILROADS — Nuisance to Adjacent Property Owner.—One whose residence is rendered unhealthy by the smoke and gas from the engines of a railroad company cannot recover damages therefor, in the absence of constitutional or statutory authority.—Atchison, T. & S. F. Ry. Co. v. Armstrong, Kan., 80 Pac. Rep. 978.

125. RAILROADS—Stop, Look and Listen Rule.—When a person stops and listens for a train at a crossing, contributory negligence cannot be based on a mere failure of such person to hear an approaching train.—Birmingham Southern Ry. Co. v. Lintner, Ala., 38 So. Rep. 363.

126. RECEIVERS — Ancillary Appointment. — Circuit Court of the United States can appoint an ancillary receiver for an insolvent corporation in aid of a primary appointment by a state court of another state.—Scaife v. Scammon Inv. & Sav. Assn., Kan., 80 Pac. Rep. 957.

127. REFORMATION OF INSTRUMENTS—Enforcement of Contract.—It is not essential that formal reformation of a written contract be had before its enforcement as reformed.—Huber Mfg. Co. v. Claudel, Kan., 80 Pac. Rep. 960.

128 REFORMATION OF INSTRUMENTS—Grounds.—Where a contract as written, through mistake of either fact or law, fails to embody the actual agreement and intention of the parties, a court of equity will reform it to conform to such agreement and intention.—Carrell v. McMurray, U. S. C. C , W. D. Ark., 136 Fed. Rep. 661.

129. REFORMATION OF INSTRUMENTS—Mistake.—Mere mission to resort to means of knowledge which would obviate a mistake in a contract to sell land, where there is no neglect of legal duty, does not bar relief.—Benesh v. Travelers' Ins. Co., N. Dak., 103 N. W. Rep. 405.

130 ROBBERY—Pleading and Proof.—Proof that robbery was accomplished by both force and fear is not a variance from the information, alleging the taking by fear.—State v. Sanders, N. Dak., 103 N. W. Rep. 519.

131. SALES—Conditions of Option.—Where an option to purchase hides required the doing of certain acts to prepare them for delivery, the buyer held not required to pay or secure the price before the performace of such acts.—Kibler v. Caplis, Mich., 103 N. W. Rep. 531.

132. SALES—Conditional Sales.—A seller of implements under a conditional sale held not entitled to recover the same from the sheriff, holding the goods as the property of a subsequent *bona fide* purchaser from the original

vendee.—South Bend Iron Works v. Reedy, Del., 60 Atl. Rep. 698.

133. SALES—Delivery.—An agreement to sell property at a stated price "f. o. b." implies that the seller will place the property on the cars at the designated point free of expense.—Hunter Bros. Milling Co. v. Kramer Bros., Kan., 80 Pac. Rep. 963.

134. SPECIFIC PERFORMANCE—Oral Option.—Specific performance of an option held not to be defeated on the ground of want of mutuality.—Finlen v. Heinz, Mont, 80 Pac. Rep. 918.

135. STATES—Boundaries.—The middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5, 1867, decreed to be the true boundary line between Missouri and Nebraska.—State of Missouri v. State of Nebraska, U. S. S. C., 25 Sup. Ct. Rep. 580.

136. STATUTES—What Constitutes.—Long-continued neglect to apply a penal statute in a certain manner held not to preclude such an application of it.—State v. Nease, Oreg., 80 Pac. Rep. 897.

137. SUBROGATION—Administrators.—One who has loaned money to an administrator on a void mortgage to pay a previously executed void mortgage may not subrogate it to a lien discharged with the proceeds of the latter mentioned mortgage.—Henry v. Henry, Neb., 103 N. W. Rep. 441.

138. TAXATION—Invalid Assessment.—A voluntary payment of personal taxes assessed under an invalid statute for one year could not affect the right to raise a question of the invalidity of the tax in an action for taxes subsequently accruing.—City of Detroit v. Mackinaw Transp. Co., Mich., 103 N. W. Rep. 557.

139. TAXATION.—Tax Deed.—Legal conclusions of invalidity, illegality, and noncompliance with the law in a pleading attacking a tax deed will be construed to relate to defects concerning which specific allegations were made.—Crebbin v. Wever, Kan., 80 Pac. Rep. 977.

140. TAXATION—Void Sale.—Where a sale of land for taxes was void, the landowner held not required to pay the taxes paid out by such purchaser, with interest, as a condition to a decree cancelling the purchaser's certificates and deeds.—Paine v. Germantown Trust Co., U. S. C. C. of App., Eighth Circuit, 136 Fed. Rep. 527.

141. TELEGRAPHS AND TELEPHONES—Trespass to Land.—In an action against a telegraph company for trespass on plaintiff's land, question for the jury whether permit to do so was procured for valuable consideration.—Burnett v. Postal Telegraph Cable Co., S. Car., 50 S. E. Rep. 780.

142. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—Unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators, where such use in a partnership would not be objectionable.—Howe Scale Co. v. Wyckoff, Seamans & Benedict, U. S. S. C., 25 Sup. Ct. Rep. 609.

143. TRIAL—Function of Jury.—The jury should be permitted to draw the conclusion from undisputed facts, where reasonable persons might differ as to such conclusion.—Rothrock v. City of Cedar Rapids, Iowa, 103 N. W. Rep. 475.

144. TRIAL—Malpractice Against Physician.—In an action for malpractice, an instruction on the necessity of defendant having an X-ray machine held not erroneous for not referring to the case of specialists.—Beadle v. Paine, Oreg., 80 Pac. Rep. 903.

145. TRIAL—Motion to Direct Verdict.—Where motion to direct a verdict is overruled, and party is compelled to submit the matter to the jury, and assist in the submission thereof, he may contend that the verdict is not supported by the evidence.—Sorensen v. Sorensen, Neb., 103 N. W. Rep. 455.

146. TRIAL—Special Verdict.—A party held not entitled to submission of questions to the jury, answers which involve a recitation of a large part of the testimony.—Jenkins v. Beachy, Kan., 80 Pac. Rep. 947.

147. TRUSTS—Husband and Wife.—Where a husband taxes title to land in his own name, and it is shown that the wife furnished part of the purchase money, there is a presumption that the money was a gift.—Pickens v. Wood, W. Va., 50 S. E. Rep. 818.

148. VENDOR AND PURCHASER—Failure to Make Title.—Vendee in possession under executory contract for purchase of real estate cannot retain both the land and the purchase money until a perfect title is offered to him.—Livesley v. Muckle, Oreg., 80 Pac. Rep. 901.

149. VENDOR AND PURCHASER—Parol Modification of Written Contract.—Parol modification of a written contract for the sale of land, followed by delivery and acceptance of the deed thereunder, held alteration of the written contract by an executed parol agreement.—Benesh v. Travelers' Ins. Co., 103 N. W. Rep. 405.

150. VENDOR AND PURCHASER—Rescission of Contract.—A demand for the return of the deed, sent to the vendor's agent to be delivered on payment of the money, the same person being the agent of the vendee, with notice that the deal is off, held a rescission of the contract.—Mason v. Strickland, Neb., 103 N. W. Rep. 458.

151. WATERS AND WATER COURSES—Fire Protection.—Failure of a water company to comply with stipulation of contract as to pressure held not to render it liable for the loss of a building by fire.—Jones v. Durham Water Co., N. Car., 50 S. E. Rep. 769.

152. WILLS—Burden of Proving Undue Influence.—The fact of relationship and of opportunity to exercise influence does not cast on the child the burden of proving that a will in its favor was not obtained by undue influence.—*In re* Sperl's Estate, Minn., 103 N. W. Rep. 502.

153. WILLS—Construction.—In a bequest "to the issue of my sister M" and their heirs, the word "issue" is used to denote children.—Logan v. Cassidy, S. Car., 50 S. E. Rep. 794.

154. WILLS—Directing Verdict as to Undue Influence.—A court is not justified in directing a judgment notwithstanding the verdict that a will in favor of a child was obtained by undue influence except in clear cases.—*In re* Sperl's Estate, Minn., 103 N. W. Rep. 502.

155. WILLS—Lost or Spoliated Will.—In a contest to set aside a will admitted to probate as a lost or spoliated will, after the probate record has been introduced by defendant, the burden is on plaintiff to establish that the will so probated is not the last will of deceased.—Hutson v. Hartley, Ohio, 74 N. E. Rep. 197.

156. WILLS—Words Creating Trust.—It is not necessary to use the word "trust" or "trustee," or other technical terms, in order to create a valid trust by will.—Hughes v. Fitzgerald, Conn., 60 Atl. Rep. 694.

157. WITNESSES—Applicability of Rule "Falsus in Uno, Falsus in Omnibus."—The elements to be considered in determining whether the rule of "*falsus in uno, falsus in omnibus*," is applicable to the evidence in a cause, determined.—Pumorlo v. City of Merrill, Wis., 103 N. W. Rep. 464.

158. WITNESSES—Cross-Examination of Defendant.—When the accused testifies in his own defense, he may be cross-examined as an ordinary witness, but not as to matters not brought out on direct examination which tend to disgrace him.—Razee v. State, Neb., 103 N. W. Rep. 438.

159. WITNESSES—Discretion in Allowing Questions.—Refusal to permit inquiries of a witness as to the relation of attorney and client between the witness and an attorney for the plaintff, to show bias of the witness against the defendant, is not an abuse of discretion.—Birmingham Southern Ry. Co. v. Lintner, Ala., 38 So. Rep. 363.

160. WITNESSES—Transactions with Deceased Parties.—On appeal from an order allowing the account of an administrator, certain testimony held not incompetent under the statute relative to testimony as to matters equally within the knowledge of a decedent.—Reed v. Whipple, Mich., 103 N. W. Rep. 548.